Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SCS BUSINESS & TECHNICAL INSTITUTE, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a State or state agency is a "person" subject to suit under the False Claims Act, 31 U.S.C. 3729 *et seq.*

PARTIES TO THE PROCEEDINGS

The United States of America, represented by the Attorney General of the United States, was an intervenor in the court of appeals and is the petitioner in this Court. The State of New York was an appellant/cross-appellee in the court of appeals. The United States of America ex rel. Ronald E. Long was an appellee/cross-appellant in the court of appeals. Joseph P. Frey was an appellant in the court of appeals. The following parties were defendants in the district court and were treated as appellees by the court of appeals: SCS Business & Technical Institute, Inc.; Kamal Alsultany; Mohammed ("Michael") Alharmoosh; Sylvana Alharmoosh; Marguerite Alsultany; Casablanca Resorts Development of Anguilla, Ltd.; Casablanca Resorts, Ltd.; Intervest International Holding Corp.; and Intervest Holding Corp.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	3
Argument	5
Conclusion	6
Appendix A	1a
Appendix B	43a
Appendix C	61a

TABLE OF AUTHORITIES

Cases:

Vermont Agency of Natural Resources v. *United States ex rel. Stevens*, cert. granted, No. 98-1828 (June 24, 1999)	5, 6

Constitution and statutes:

U.S. Const. Amend. XI	2, 4
False Claims Act, 31 U.S.C. 3729 *et seq.*	3
31 U.S.C. 3729	4
31 U.S.C. 3729(a)	2, 3, 4, 5
31 U.S.C. 3729(a)(1)	3
31 U.S.C. 3729(a)(2)-(7)	3
31 U.S.C. 3730(a)	3
31 U.S.C. 3730(b)(1)	3
31 U.S.C. 3730(b)(2)	3
31 U.S.C. 3730(c)(3)	3
31 U.S.C. 3730(d)	3
28 U.S.C. 2403(a)	4

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-42a) is reported at 173 F.3d 870. A supplemental opinion of the court of appeals (App., *infra*, 43a-60a) is reported at 173 F.3d 890. The opinion of the district court (App., *infra*, 61a-103a) is reported at 999 F. Supp. 78.

JURISDICTION

The judgment of the court of appeals was entered on April 2, 1999. On June 17, 1999, the Chief Justice extended the time for filing a petition for a writ of certio-

rari to and including August 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

2. Section 3729(a) of Title 31, United States Code, provides in pertinent part:

> **False claims**
>
> (a) LIABILITY FOR CERTAIN ACTS. –Any person who–
>
> (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;
>
> * * * * *
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person.

STATEMENT

1. The False Claims Act (FCA), 31 U.S.C. 3729 *et seq.*, prohibits any "person" from "knowingly present[ing], or caus[ing] to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval." 31 U.S.C. 3729(a)(1). The FCA also prohibits a variety of related deceptive practices involving government funds and property. 31 U.S.C. 3729(a)(2)-(7). A "person" who violates the FCA "is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains." 31 U.S.C. 3729(a).

Suits to collect the statutory penalties may be brought either by the Attorney General, or by a private person (known as a relator) in the name of the United States, in an action commonly referred to as a *qui tam* action. See 31 U.S.C. 3730(a) and (b)(1). When a *qui tam* action is brought, the government is given an opportunity to intervene to take over the suit. 31 U.S.C. 3730(b)(2) and (c)(3). If the government declines to intervene, the relator conducts the litigation. 31 U.S.C. 3730(c)(3). If a *qui tam* action results in the recovery of civil penalties, those penalties are divided between the government and the relator. 31 U.S.C. 3730(d).

2. The instant case involves a *qui tam* action filed by Ronald E. Long, a former employee of the State of New York. The defendants (respondents in this Court) included, *inter alia*, the State of New York and a state official. The state defendants moved to dismiss the claims against them on various grounds.

The district court denied the state defendants' motion to dismiss the *qui tam* claims against them. App., *infra*, 61a-103a. The district court "reject[ed] New York's argument that the Eleventh Amendment bars an FCA action against a state." *Id.* at 68a. The court explained that "[t]he Eleventh Amendment is not a bar to an FCA action because the United States is always the plaintiff in a *qui tam* action and the Eleventh Amendment does not prohibit suits by the United States against States in federal court." *Ibid.* The court also held that a State is a "person" subject to potential FCA liability under 31 U.S.C. 3729. App., *infra*, 69a-73a.

3. The State of New York filed an interlocutory appeal, contending that it is not a "person" subject to liability under the FCA, and that a *qui tam* suit against it is barred by the Eleventh Amendment. The United States government, represented by the Attorney General, intervened pursuant to 28 U.S.C. 2403(a) to defend the constitutionality of the FCA's *qui tam* provisions. See App., *infra*, 5a. The court of appeals reversed the decision of the district court, holding that a State is not a "person" within the meaning of Section 3729(a). *Id.* at 1a-42a. Although the court did not squarely decide whether *qui tam* suits against state defendants would violate the Eleventh Amendment, its interpretation of Section 3729(a) was based in part on the principle that ambiguous statutory provisions should be construed in a manner that avoids substantial constitutional questions. *Id.* at 34a-42a.[1]

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[1] The court of appeals subsequently issued a supplemental opinion explaining the court's determination that it was not required to resolve the Eleventh Amendment question before ad-

ARGUMENT

On June 24, 1999, this Court granted the petition for a writ of certiorari in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828. The first question presented in that case is "[w]hether a State is a 'person' subject to liability under 31 U.S.C. 3729(a) of the False Claims Act." 98-1828 Pet. at i.[2] The petition explains that the Second Circuit's resolution of that interpretive question in *Vermont Agency of Natural Resources* conflicts directly with the D.C. Circuit's decision in the instant case. See 98-1828 Pet. at 7-12.

As our response to the certiorari petition in *Vermont Agency of Natural Resources* explains (98-1828 U.S. Br. at 11-13), the position of the United States is that a State or state agency is a "person" subject to potential FCA liability under 31 U.S.C. 3729(a). The Court's decision in *Vermont Agency of Natural Resources* will very likely affect the proper disposition of the instant case. The petition for a writ of certiorari should therefore be held pending this Court's decision in *Vermont Agency of Natural Resources* and then disposed of as appropriate.

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dressing the issue of statutory construction. See App., *infra*, 43a-60a.

[2] *Vermont Agency of Natural Resources* also presents the question "[w]hether the Eleventh Amendment precludes a private relator from commencing and prosecuting a False Claims Act suit against an unconsenting State." 98-1828 Pet. at i.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Vermont Agency of Natural Resources* v. *United States ex rel. Stevens*, No. 98-1828, and disposed of as appropriate in light of the resolution of that case.

Respectfully submitted.

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AUGUST 1999

APPENDIX A

UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-5133, 98-5149 AND 98-5150

UNITED STATES OF AMERICA, EX REL.
RONALD E. LONG, APPELLEE/CROSS-APPELLANT

v.

SCS BUSINESS & TECHNICAL
INSTITUTE, INC., ET AL., APPELLEES

STATE OF NEW YORK, APPELLANT/CROSS-APPELLEE

v.

ATTORNEY GENERAL OF THE UNITED STATES,
INTERVENOR

[Argued Jan. 14, 1999
Decided April 2, 1999]

OPINION

Before: WALD, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

SILBERMAN, Circuit Judge:

The question presented in this appeal is whether states are defendant persons under the False Claims Act. Contrary to the decisions of the Second and Eighth Circuits, *see United States ex rel. Stevens v. Vermont Agency of Natural Resources*, 162 F.3d 195 (2d Cir. 1998); *United States ex rel. Zissler v. Regents of the Univ. of Minn.*, 154 F.3d 870 (8th Cir.1998), we hold that they are not.

I.

Ronald Long was the Coordinator of Investigations and Audit for the Bureau of Proprietary School Supervision of the New York State Department of Education, the state agency that regulates proprietary schools. In 1989, he conducted an investigation of SCS Business and Technical Institute, which operates five business and technical schools in New York City, and discovered that SCS allegedly had made false and fraudulent claims to the federal government in return for federal funding for students attending SCS schools under tuition assistance programs. He also determined, according to his complaint subsequently filed in district court, that Joseph P. Frey, his supervisor at the Bureau, and other officials in the State Department of Education, knew about SCS' fraudulent claims and conspired with SCS to conceal the fraud in order to secure further federal funding for SCS. They did so because, after a 1990 change in New York State law, the Bureau's funding depended in substantial part on tuition assessments and fines that SCS paid to the Bureau. Long's theory was that since the Bureau received a share of the federal funds that SCS fraudulently obtained from the United States, the Bureau had

every incentive to see that fraud continue. He claims that after he reported the results of his investigation to state and federal authorities, Frey and other state officials took actions to limit and subvert his investigation.

Long was taken off the investigation and then fired in 1992, shortly after SCS settled administrative charges brought against one of SCS' schools by the state education department. According to him, the settlement agreement, which did not benefit the United States in any way and grossly understated the extent of SCS' fraudulent practices, was a sweetheart deal that was but another instance of the state's conspiracy with SCS to conceal and perpetuate SCS' fraud—a conspiracy that he alleges continued until SCS filed for bankruptcy in 1995. He alleges that after the settlement, New York ignored evidence of SCS' continuing fraud and falsely represented to the United States that SCS' fraud had ceased and that it was actively monitoring SCS.

Long filed a complaint in the district court against Frey, other state officials, the State of New York, SCS, and various SCS officials. He brought his case as a *qui tam* relator under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.* (1994), suing in the name of the United States for the benefit of the United States and himself. He contended that the state defendants violated the Act by conspiring with SCS to have false claims submitted to the United States and by causing false claims to be submitted. The state defendants were also alleged to have violated the whistle-blower provision of the Act by harassing and wrongfully discharging Long, and to have been unjustly enriched under state common

law. The United States (the government) subsequently intervened in the case against the SCS defendants, but declined to intervene against the state defendants. The state defendants moved to dismiss the complaint on the grounds that states are not defendant persons under the Act and that, even if they were, the Eleventh Amendment to the United States Constitution would bar the suit. It was also asserted that Long's suit against the state defendants was barred by the Act because the allegations of fraud had been publicly disclosed and because Long was not an "original source" of the information.

The district court denied in part the state defendants' motion to dismiss, concluding that states are defendant persons under the Act and that the Eleventh Amendment does not bar the suit. *See United States ex rel. Long v. SCS Bus. & Technical Inst.*, 999 F. Supp. 78 (D.D.C. 1998).[1] The state defendants filed an interlocutory appeal challenging the district court's rejection of their Eleventh Amendment defense, over which we have jurisdiction under 28 U.S.C. § 1291 (1994) and the collateral order doctrine. *See Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-45, 113 S. Ct. 684, 121 L.Ed.2d 605 (1993). We exercise pendent appellate jurisdiction over the "inextricably intertwined" statutory question, *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 (D.C. Cir.

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[1] The district court granted the motion to dismiss Long's whistleblower and unjust enrichment claims, the former because the Eleventh Amendment bars private suits brought against the state (although it does not bar Long's claim for prospective relief against Frey, a state official), and the latter because Long has no standing to assert the government's claim of unjust enrichment under state common law. *See Long*, 999 F. Supp. at 91-93.

1996) (quoting *Swint v. Chambers County Comm'n*, 514 U.S. 35, 51, 115 S. Ct. 1203, 131 L.Ed.2d 60 (1995)), of whether states are defendant persons under the Act.[2] Thirty-six states join as *amici curiae* in support of appellant New York's statutory and Eleventh Amendment arguments, and appellee Long, the relator, is joined by the government as intervenor defending the constitutionality of the Act.

II.

To persuade us to uphold the decision below, appellees Long and the government must demonstrate that the district court correctly interpreted the term

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[2] The district court also concluded that Long's suit was not barred by the public disclosure and original source provisions of the Act. *See Long*, 999 F. Supp. at 87-89. Although the parties challenge aspects of those rulings on appeal, we need not address them further given our resolution of the case in favor of New York. We also decline to exercise pendent appellate jurisdiction over the statutory whistle-blower and constitutional claims against appellant Frey in his individual capacity. Although these claims are not foreclosed by anything in our opinion, they are not in any way related to the Eleventh Amendment and statutory construction questions that we decide today. And although an inextricable relation between claims is not a necessary condition for pendent appellate jurisdiction, *see Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997), and efficiency interests might counsel in favor of resolving these claims now, we could not possibly terminate the entire case against Frey—even if we agreed with him—because Long also asserted § 1983 claims against him that the district court did not dismiss and from which Frey does not now seek to appeal. That, coupled with the otherwise unappealable nature of the order as to Frey, a separate appellant, *see Gilda Marx*, 85 F.3d at 678, and the presence of factual disputes in the briefs on the "original source" and "public disclosure" questions, *see id.* at 679, leads us to reject Frey's request that we resolve these claims now.

"person" (liable for making a false claim) in § 3729(a) of the False Claims Act to include states.[3] In that respect, they have no little burden because the statute does not define the term "person" and, as the Supreme Court has remarked before, "in common usage, the term 'person' does not include the sovereign, [and] statutes employing the [word] are ordinarily construed to exclude it." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989) (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667, 99 S. Ct. 2529, 61 L.Ed.2d 153 (1979) (quoting *United States v. Cooper Corp.*, 312 U.S. 600, 604, 61 S. Ct. 742, 85 L.Ed. 1071 (1941))) (alteration in original); *see also, e.g., Georgia v. Evans*, 316 U.S. 159, 161-62, 62 S. Ct. 972, 86 L.Ed. 1346 (1942).[4]

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[3] The statute provides, in relevant part:

> (a) Liability for certain acts. Any person who—
>
> . . .
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false claim allowed or paid . . . is liable to the United States Government. . . .

31 U.S.C. § 3729 (1994).

[4] As appellees observe, the Eighth Circuit rejected application of this rule in interpreting the False Claims Act on the ground that the presumption of sovereign exclusion applies only to the enacting sovereign. *See Zissler*, 154 F.3d at 874. However, the Court in *Will* applied this rule even though the enacting sovereign (the United States) was different from the state sovereigns excluded from the term person, *see Will*, 491 U.S. at 64, 109 S. Ct. 2304, implicitly rejecting the Eighth Circuit's position as it was then

This "often-expressed understanding," *Will*, 491 U.S. at 64, 109 S. Ct. 2304, is not a "hard and fast rule of exclusion," *Wilson*, 442 U.S. at 667, 99 S. Ct. 2529 (quoting *Cooper*, 312 U.S. at 604-05, 61 S. Ct. 742), and depends in important part on the "context, the subject matter, legislative history, and executive interpretation," *id.*—which sounds like rather garden variety statutory interpretation. But if the *Will-Wilson* rule has any meaning at all, it must create at minimum a default rule; states are excluded from the term person absent an affirmative contrary showing. *See International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 83, 111 S. Ct. 1700, 114 L.Ed.2d 134 (1991) (noting that the "conventional reading" of person to exclude states may be "disregarded" if there is an affirmative showing of Congress' intent to include them). This interpretive principle, the Supreme Court tells us, is "particularly applicable" where, as here, "it is claimed that Congress has subjected the states to liability to which they had not been subject before." *Will*, 491 U.S. at 64, 109 S. Ct. 2304; *see also Wilson*, 442 U.S. at 667, 99 S. Ct. 2529. We think, therefore, that the district court had it backwards when it concluded that it found "no indication that Congress sought to create an exception for state actors to perpetrate fraud upon the federal government *Long*, 999 F.Supp. at 85.[5]

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articulated in Justice Brennan's dissent, *see id.* at 73, 109 S. Ct. 2304 (Brennan, J., dissenting).

[5] In reaching this conclusion, the district court was guided by its assumption that the "clear statement" rule of *Will*, 491 U.S. at 65, 109 S. Ct. 2304, did not apply—an issue which we take up below. But the district court incorrectly equated *Will*'s "clear statement" rule with the traditional rule presuming that the term

Our review of the "legislative environment," *Evans*, 316 U.S. at 161, 62 S. Ct. 972, leads us to doubt appellees have met their burden. As we noted, neither the Act as currently written nor as originally passed in 1863 defines the term person. Indeed, the original Act distinguished for punishment purposes between fraudulent acts committed by "any person in the land or naval forces of the United States," Act of March 2, 1863, 37th Cong., 3d Sess., ch. 67, § 1, 12 Stat. 696, and "any person not in the military or naval forces of the United States," *id.* at § 3, 12 Stat. 698. Since states would not have been thought to fall within either classification, that Act can hardly be said to supply facially the requisite affirmative showing that the *Will-Wilson* default rule requires.[6]

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person does not include states. *Compare Will*, 491 U.S. at 65 (clear statement rule), *with id.* at 64, 109 S. Ct. 2304 (default rule that person does not include states). Even if the former rule were not implicated here, the latter rule—which all parties concede applies-dictates a presumption opposite to the one the district court applied.

[6] The Second Circuit explained this problem away by reasoning that the Congress' undeniable intent to include military contractors in the Act refuted any attempt to read "persons not in the military" as impliedly referring only to natural, as opposed to corporate, persons. *See Stevens*, 162 F.3d at 205-06. The default rule of statutory construction governing corporations as "persons," however, is precisely the opposite of the default rule that we must apply in this case. *See Wilson*, 442 U.S. at 666, 99 S. Ct. 2529 (stating that the "word 'person' for purposes of statutory construction, unless the context indicates to the contrary, is normally construed to include" corporations). Since we must look for an affirmative intent to include states, that contractors, under the default rule for corporations, could have been thought to be "person[s] not in the military" is hardly supportive of appellees' case.

Appellees nevertheless invoke the broad purposes and legislative history of the Civil War statute. We think that is not helpful because, as the Supreme Court has said, Congress' primary concern at the time—admittedly not its exclusive one—was to put an end to "frauds perpetrated by large [military] contractors during the Civil War." *United States v. Bornstein*, 423 U.S. 303, 309, 96 S. Ct. 523, 46 L.Ed.2d 514 (1976); *see United States ex rel. Graber v. City of New York*, 8 F. Supp.2d 343, 352 (S.D. N.Y. 1998).[7] Appellees point to the Supreme Court's statement that Congress sought to "reach all types of fraud, without qualification, that might result in financial loss to the Government." *United States v. Neifert-White Co.*, 390 U.S. 228, 232, 88 S. Ct. 959, 19 L.Ed.2d 1061 (1968) (holding that the term "claim" was not limited to claims submitted for payments due and owing from the government, but included claims for favorable action by the government upon applications for loans). But we think that description is too general—it was also made in an entirely different context—to answer the serious question whether states were made potential defendants under the Act. (According to appellees' reasoning, foreign governments that entered into commercial dealings with the United States would also be potential defendants.) Similarly unpersuasive is the policy proposition put forward by the Eighth Circuit, *see Zissler*, 154 F.3d at 874, that a truly effective anti-fraud statute would subject states to liability since states receive substantial amounts of money from the federal government. *See also* JOHN T. BOESE, CIVIL FALSE CLAIMS AND QUI TAM ACTIONS, at 2-91 (1993) (stating that states can be defendant persons because they are "major recipients

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[7] Of course, *Stevens*, not *Graber*, is Second Circuit law.

of federal funds"). A court looks to legislative purpose under the default rule in order to locate a congressional intent "to bring state or nation within the scope of the law," *Cooper*, 312 U.S. at 605, 61 S. Ct. 742, not to "engraft on a statute additions which [the court] think[s] the legislature logically might or should have made," *id.* Even if one assumes that states commit a good deal of fraud against the federal government, it cannot seriously be argued that the very purpose of the Act would be thwarted if states were not liable under the Act. *Compare California v. United States*, 320 U.S. 577, 585, 64 S. Ct. 352, 88 L.Ed. 322 (1944).[8]

That takes us to the legislative history. Appellees point us first to an *1862* House Committee Report that, in discussing various frauds committed during the Civil War, referred to certain state officials that had used war contracts for personal profit. *See* H.R. REP. NO. 2, 37th Cong., 2d Sess., at xxxviiixxxix (1862). But the report specifically stated that these examples of fraud were not committed *against* the United States government. *See id.* at xxxviii. So the prior report is a rather

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[8] In *Zissler*, 154 F.3d at 874, the Eighth Circuit relied on *United States v. California*, 297 U.S. 175, 186, 56 S. Ct. 421, 80 L.Ed. 567 (1936), for the proposition that it would be a mistake to exclude the states from an "act of Congress, all-embracing in scope and national in its purpose, which is as capable of being obstructed by state as by individual action," *id.* But the Supreme Court made that statement only after it had "fairly . . . inferred" that the purpose of the Federal Safety Appliance Act, albeit implicit, was to subject state-run railroads to liability. *See id.* If the mere use of the term person in a broad statute with national purposes, which states were equally capable of violating, were sufficient to bring the states within the statute's scope, the interpretive rule presuming the opposite would be largely ineffectual, if not wholly eviscerated.

tenuous link to the Act Congress passed one year later. *But see Stevens*, 162 F.3d at 206 (concluding that "it is difficult to suppose" that Congress "had *forgotten* the results of this extensive investigation" when it passed the False Claims Act) (emphasis added). Even if there were a stronger tie, the Supreme Court has held that legislative history indicating an intent to impose liability on state officials is not evidence of an intent to subject the states themselves to liability. *See Will*, 491 U.S. at 68-69, 109 S. Ct. 2304. The bottom line is that appellees have not pointed to anything in the legislative history of the 1863 Act, or in the events leading up to it, indicating that Congress actually contemplated imposing liability on the states.

Because the enacting Congress' intent is, to be charitable, rather opaque, appellees turn our attention to the 1986 amendments to the False Claims Act and to a related statute also passed in 1986. The provision of the 1986 amendments that changed 31 U.S.C. § 3729(a) from imposing liability on "[a] person not a member of an armed force of the United States" to "[a]ny person" did *not*, however, substantively expand the meaning of defendant persons under the Act. *See Stevens*, 162 F.3d at 206-07 (holding that states are persons but conceding that this change was not "envisioned as broadening the class of persons who could be held liable under the Act"); *Graber*, 8 F. Supp.2d at 354-55. It is true that the amendment expanded the types of individuals subject to the Act to include those in the military. Still, that change tells one nothing about the basic meaning of the term person, or more specifically, whether Congress intended to include states within that term. The legislative history accompanying the amendment reveals Congress' extremely limited objective. *See* S. REP. NO.

345, 99th Cong., 2d Sess., at 17-18 (1986), *reprinted* in U.S.C.C.A.N. 5266, 5282-83 (explaining that the alteration of § 3729(a) was intended to provide for monetary recovery against persons in the military and that, prior to 1986, a court martial was the only available remedy).[9] It is understandable, therefore, why appellees do not actually claim that states were made defendant persons by virtue of the 1986 amendment to § 3729(a). Instead, their argument is that states have been defendant persons all along; various provisions added by the 1986 Congress—which we discuss below—simply make that clear. In other words, appellees, by relying on these recent amendments, seek to illuminate the 1863 Congress' "original intent." We are rather dubious about such an approach. As the Supreme Court has observed, such subsequent provisions are really "beside the point" because they do not "reflect any direct focus by Congress upon the meaning of the earlier enacted provisions." *Almendarez-Torres v. United States*, 523 U.S. 224, 118 S. Ct. 1219, 1227, 140 L.Ed.2d 350 (1998); *Atkinson v. Inter-American Dev. Bank*, 156 F.3d 1335, 1342 (D.C.Cir.1998).

Be that as it may, we are not persuaded that these added provisions can bear the weight appellees would place on them. Appellees argue that Congress' decision to define "person" to include states in the Civil Investigative Demand section of the Act, *see* 31 U.S.C.

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[9] The Eighth Circuit thought that this amendment more broadly "evidenced consideration of whom to hold liable" under the amended Act. *Zissler*, 154 F.3d at 874. But there is nothing in the text of the statute or in any of the legislative history indicating that Congress' consideration of "whom to hold liable" extended beyond its intent, expressed in the statute, to bring military persons within the scope of the Act.

§ 3733(*l*)(4) (1994), indicates (some) Congress' intent to include states as persons throughout the whole Act,[10] even though this provision applies only to the Civil Investigative Demand section. *See* 31 U.S.C. § 3733(*l*) (For purposes of *this section* . . .) (emphasis added). Appellees question why Congress would create a discovery tool to be used to gain information possessed by states if the Act did not already authorize false claims actions against them. *See also Stevens*, 162 F.3d at 207. It seems rather obvious, however, that states could provide useful evidence to establish that private contractors, for example, made false claims. Nor do appellees gain very much by pointing to the Program Fraud Civil Remedies Act, 31 U.S.C. § 3801 *et seq.* (1994), which Congress also passed in 1986 to create an alternative administrative remedy to lawsuits under the False Claims Act. Unlike the False Claims Act, this Act expressly defined the persons subjected to administrative liability yet *omitted* states from the definition. *See id.* at § 3801(a)(6). Appellees suggest that the exclusion of states from § 3801(a)(6) compels an inference that § 3729(a) includes states. We do not agree because the two provisions are not part of the same legislative enactment (not even the same century). *See Halverson v. Slater*, 129 F.3d 180, 186 (D.C. Cir. 1997) (citing *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 78 L.Ed.2d 17 (1983)). We share appellant's view, moreover, that, since both acts proscribe essentially the same conduct, *compare* 31 U.S.C. § 3802(a)(1)-(2) *with* 31 U.S.C. § 3729(a), it would have been quite

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[10] The CID section permits the government to conduct discovery of persons who "may be in possession, custody, or control of any documentary material or information relevant to a false claims investigation." 31 U.S.C. § 3733(a)(1).

bizarre for Congress to exempt states from administrative liability if it had thought that states already were subject to the more onerous False Claims Act liability of treble damages and penalties. In sum, we are inclined to view the omission of states from the definition of person in the administrative act, to the extent it is relevant at all, as more supportive of New York's argument.

Indeed, appellant and its *amici*, turning the blade, point out that the 1986 amendments, which increased liability from double to treble damages and increased the civil penalty, *see* 31 U.S.C. § 3729(a), created a form of punitive damages that would be palpably inconsistent with state liability. Congress is not thought to impose punitive damages on public entities lightly. Imposition of such a penalty has been held to be inconsistent with public policy since it gives the plaintiff a windfall at the expense of the blameless or unknowing taxpayers who must foot the bill for the government's transgressions. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258-71, 101 S. Ct. 2748, 69 L.Ed.2d 616 (1981). It is true that the Supreme Court has already analyzed the Act in a related context and concluded that the statute is remedial in nature, *see, e.g., Bornstein*, 423 U.S. at 314-15, 96 S. Ct. 523, but as appellant rightly points out, it did so when the statute provided for double damages of which the government received a one-half share, so that the statute at that time truly did no more than make the government whole, *see Graber*, 8 F. Supp.2d at 349 n. 3. Even assuming that it is possible to characterize the increased liability imposed by the 1986 amendments as remedial, that would only indicate at best that in this respect the 1986 Congress legislated in such a way that *would have*

been consistent with state liability. The 1863 Congress, by contrast, made clear as day that it intended criminal, and *a fortiori* punitive, sanctions: the original statute provided for criminal penalties, including imprisonment for one to five years, for non-military persons (the class of persons said to include states) convicted under the Act, as well as fines. *See* § 3, 12 Stat. at 698. Those provisions are surely *inconsistent* with the concept of state liability.

Appellees' last sortie into the background of the 1986 amendments uncovered a piece of legislative history that they regard as the "smoking gun." They point to a Senate Report issued at the time Congress amended certain provisions of the Act that includes a section entitled "History of the False Claims Act and Court Interpretations." *See* S. REP. NO. 345, 99th Cong., 2d Sess., at 8 (1986), *reprinted in* U.S.C.C.A.N. 5266, 5273. As part of what purported to be purely descriptive history, see id. ("In its present form, the False Claims Act. . . ."), the Report states:

> The False Claims Act reaches all parties who may submit false claims. The term "person" is used in its broad sense to include partnerships, associations, and corporations . . . *as well as States and political subdivisions thereof. Cf. Ohio v. Helvering*, 292 U.S. 360, 370, 54 S. Ct. 725, 78 L.Ed. 1307 (1934); *Georgia v. Evans*, 316 U.S. 159, 161, 62 S. Ct. 972, 86 L.Ed. 1346 (1942); *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978).

Id. (emphasis added) (footnote omitted).

According to appellees, the Report confirms that the Congress of 1863, over a hundred years before, intended to include states as defendant persons—an argument that two of our sister circuits and the district court below accepted. *See Stevens*, 162 F.3d at 206-07; *Zissler*, 154 F.3d at 874-75; *Long*, 999 F. Supp. at 84-85. This portion of the Report, it should be understood, is not linked with any of the substantive amendments made by the 1986 Congress. It is instead a legislative observation about what § 3729(a), enacted by an earlier Congress, means. Courts sensibly accord such "post-enactment legislative history," arguably an outright "contradiction in terms," *Sullivan v. Finkelstein*, 496 U.S. 617, 631, 110 S. Ct. 2658, 110 L.Ed.2d 563 (1990) (Scalia, J., concurring), only marginal, if any, value, *see Wright v. West*, 505 U.S. 277, 295 n. 9, 112 S. Ct. 2482, 120 L.Ed.2d 225 (1992) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one.") (quoting *Consumer Product Safety Comm'n v, GTE Sylvania, Inc.*, 447 U.S. 102, 117, 100 S. Ct. 2051, 64 L.Ed.2d 766 (1980) (quoting *United States v. Price*, 361 U.S. 304, 313, 80 S. Ct. 326, 4 L.Ed.2d 334 (1960))).[11] Post-enactment legislative

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[11] It is unclear what appellees think they add by pointing to a 1981 General Accounting Office Report that documented recent instances of state officials defrauding the United States government—of which the Senate apparently was aware when amending the statute in 1986. *See* S. REP. NO. 345, 99th Cong., 2d Sess., at 2 & n.1 (1986), *reprinted in* U.S.C.C.A.N. at 5266, 5267 (citing GAO Report to Congress, FRAUD IN GOVERNMENT PROGRAMS: HOW EXTENSIVE IS IT? HOW CAN IT BE CONTROLLED ? (1981)). Not only is evidence of an intent to impose liability on state officials (which itself would be a tenuous inference from this report) distinct from an intent to impose liability on the states themselves, *see Will*, 491 U.S. at 68-69, 109 S. Ct. 2304, but a report

history—perhaps better referred to as "legislative future"—becomes of absolutely no significance when the subsequent Congress (or more precisely, a committee of one House) takes on the role of a court and in its reports asserts the meaning of a prior statute. *See Pierce v. Underwood*, 487 U.S. 552, 566, 108 S. Ct. 2541, 101 L.Ed.2d 490 (1988); *In re North*, 50 F.3d 42, 45-46 (D.C. Cir. 1995). The Senate Report actually was more modest; it appeared only to describe the way in which the Supreme Court had interpreted the Act. Still, its author either did not read the cited cases very carefully, or perhaps more likely, made an unforgivably misleading use of the "*cf.*" signal. None of the cases interpreted the term "person" under the False Claims Act, and all three stand for the unremarkable proposition that governmental entities can be included in the term person when Congress so intends.[12] In short, the Report is of no legal significance. *Accord United States ex rel Graber*, 8 F. Supp.2d at 354-55.[13]

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documenting contemporary instances of state fraud could hardly be thought to illuminate the intent of the enacting Congress in 1863.

[12] The Report's resort to these inapposite cases is unsurprising since, at the time of the 1986 amendments, only one decision involved a *qui tam* suit against the state, and that decision held that states were not persons under the Act. *See United States ex rel. Weinberger v. Florida*, 615 F.2d 1370, 1371 (5th Cir. 1980) (describing district court's decision to that effect and vacating on the ground that, under an older and since modified version of the present 31 U.S.C. § 3730, the district court lacked subject matter jurisdiction because the federal government had knowledge of the facts underlying the relator's suit).

[13] The Eighth Circuit thought that 1986 amendments to § 3729(a) warranted giving the 1986 Report greater interpretive weight, even on the assumption that the Report's understanding of the pre-1986 caselaw was incorrect. *See Zissler*, 154 F.3d at 874.

Nevertheless, appellees contend that we have asked the wrong question in searching the legislative materials for affirmative indications that Congress intended to *include* states as defendant persons in § 3729(a). Instead, they would have us start with the presumption that states are defendant persons and look only for some indication that Congress intended to *exclude* states. They justify this approach by arguing that states can be plaintiffs under § 3730(b)(1) (providing that "[a] person may bring a civil action for a violation of section 3729 for the person and for the United States Government"), and that the same statutory term, person, is used to describe the eligible class of plaintiffs.[14] The word person is presumed to have the same meaning in different sections of the same statute. *See, e.g., Commissioner v. Lundy*, 516 U.S. 235, 250, 116 S. Ct. 647, 133 L.Ed.2d 611 (1996). Appellees, then, would use the canon of consistent meaning (following the Second and Eighth Circuits) to trump the *Will-Wilson* default rule. *See Stevens*, 162 F.3d at 205; *Zissler*, 154 F.3d at 875; *see also* BOESE, *supra*, at 2-92 (reasoning that states are defendant persons under the Act because they are proper *qui tam* plaintiffs).

The consistent meaning canon is brandished as if the question whether states could be *qui tam* relators were

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Again, the change to § 3729(a) had nothing to do with the meaning of the term person. The portion of the Report in question, moreover, makes no reference whatsoever to the slight alteration actually made to § 3729(a). It is merely a commentary on the past.

[14] Although New York seemed insistent that it can have it both ways—that it can be a plaintiff but not a defendant—the states, appearing as *amici*, seemed quite prepared to abandon any claim that they could sue as plaintiffs; the threat of being a *qui tam* defendant apparently "concentrated their minds."

a statutory given. But it is not. We recognize that other courts have *assumed* that states can be *qui tam* relators, *see, e.g., United States ex rel. Woodard v. Country View Care Ctr., Inc.*, 797 F.2d 888 (10th Cir.1986); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), even though the term person under § 3730(b)(1) is no more clearly defined than it is under § 3729(a). The argument that states are plaintiffs is based on a provision passed in 1986 conferring jurisdiction on the district courts "over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrences as [a *qui tam suit*] brought under Section 3730." 31 U.S.C. § 3732(b). If states are the only parties who could bring a state law suit to recover state funds, the argument goes, and if a state is forbidden by § 3730(b)(5) from intervening in another party's *qui tam* suit, *see id.* at § 3730(b)(5) (providing that "[w]hen a person brings an action under this subsection no person other than the Government may intervene or bring a related action based on the facts underlying the pending action"), it seems to follow that the Congress which enacted § 3732(b) intended states to be *qui tam* relators under the Act. Otherwise, it is argued, the provision conferring jurisdiction over the state's claim under state law has little meaning. The legislative history lends some support to this reasoning. *See* S. REP. NO. 345, 99th Cong., 2d Sess., at 16 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5281 (explaining that the provision was enacted in response to comments from the National Association of Attorneys General and was intended to allow "State and local governments to join State law actions with False Claims Act actions brought in Federal district court if such actions grow out of the same transaction or occur-

rence"); *see also id.* at 12-13, *reprinted in* 1986 U.S.C.C.A.N. at 5277-78 (disapproving of *Dean* decision on unrelated jurisdictional grounds but not questioning the State of Wisconsin's ability to be a *qui tam* plaintiff); *Stevens*, 162 F.3d at 204-05 (discussing Senate Report).

The more obvious reading of § 3732(b), however, is that it authorizes permissive intervention by states for recovery of state funds (creating what is in effect an exception to § 3730(b)(5)'s apparent general bar on intervention by all other parties except for the United States). *See* BOESE, *supra*, at 4-13 (explaining that § 3732(b) "does not require the state to be a relator for jurisdiction to exist," noting the possibility that it permits intervention by states, but making no reference to § 3730(b)(5)). Or Congress might even have meant § 3732(b) to provide supplemental jurisdiction for a non-state relator to join a federal false claim action with an action to recover state funds under a *state qui tam* statute, which several states have enacted. *See, e.g.*, Cal. Gov't Code § 12650 *et seq.* (West 1998); Fla. Stat Ann. § 68.081-092 (West 1998).

In any event, the argument that states are relators under § 3730(b)(1) is rather strained. To the extent it relies on the Senate Report author's knowledge of one suit by a state relator, it is no more persuasive than the analogous argument based on the Report's "recognition" of prior suits against state defendants. The argument, moreover, depends on the proposition that § 3730(b)(5) prevents all parties, except for the United States, from intervening in another relator's *qui tam* action. Yet it is not at all clear that this provision precludes all forms of party joinder, which would effec-

tively limit *qui tam* actions to single relators. *See United States ex rel. Precision Co. v. Koch Indus., Inc.*, 31 F.3d 1015, 1017 (10th Cir. 1994) (holding that § 3730(b)(5) does not prohibit all forms of joinder but only prevents permissive intervention in a relator's suit by unrelated parties under Fed. R. Civ. P. 24(b)(2)). If states could join as co-plaintiffs with private relators or the federal government, then § 3732(b) could be given full meaning without reading § 3730(b)(1) to include states as relators.

It should be apparent, then, that whether states can be *qui tam* relators presents an extraordinarily difficult question of statutory interpretation in its own right. Although appellees do not acknowledge it, their argument would require us to puzzle through that question—not squarely presented to us—in order to resolve the actual question before us (itself no easy one) in their favor. The consistent meaning canon does not have much usefulness if in order to apply it a court has to struggle that hard to determine the second meaning, against which the first is to be compared. Given the uncertainty governing the question whether states can be relators, we think the proper course is to decide only the issue before us.[15]

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[15] Even assuming *arguendo* that states can be relators, we doubt that the consistent meaning canon is appropriately applied in this case. The canon itself has an important exception "[w]here the subject-matter to which the words refer is not the same in the several places where they are used." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433, 52 S .Ct. 607, 76 L.Ed. 1204 (1932). Imposing liability is quite different from conferring a right to sue, and as we noted above, the *Will-Wilson* default rule has added force when the question is whether states are subject to liability as persons. *See Will*, 491 U.S. at 64, 109 S. Ct. 2304. The

canon also encounters potentially insurmountable difficulties when the "meanings" are enacted by two different Congresses—which is an obvious flaw in appellees' effort to use the 1986 amendments' effect on the term person in § 3730(b)(1) to give consistent meaning to the term person in § 3729(a), which was enacted by the 1863 Congress.

It might be argued that the 1986 amendments merely clarified that Congress has intended states to be relators since 1863, and that the consistent meaning canon really applies to the 1863 Congress alone. But this theory would require us, quite illogically, to interpret the 1986 legislative action as a declaration of what a Congress over a century earlier intended. The action of the 1986 Congress tells us, at most, what the 1986 Congress thought about states as *qui tam* relators (and as we noted above, it does not tell us very much); it does not purport to tell us, nor could it, what the 1863 Congress intended. *See Rainwater v. United States*, 356 U.S. 590, 593, 78 S. Ct. 946, 2 L.Ed.2d 996 (1958) (stating that 1918 amendment to the criminal provisions of the False Claims Act was at most "merely an expression of how the 1918 Congress interpreted a statute passed by another Congress more than a half century before" and had "very little, if any, significance" in interpreting the original Act's civil provisions). Although the Supreme Court occasionally says that "[s]ubsequent legislation which declares the intent of an earlier law is entitled to great weight in statutory construction," *Loving v. United States*, 517 U.S. 748, 770, 116 S. Ct. 1737, 135 L.Ed.2d 36 (1996) (quoting *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n. 3, 100 S. Ct. 2051, 64 L.Ed.2d 766 (1980) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81, 89 S. Ct. 1794, 23 L.Ed.2d 371 (1969))), the Supreme Court's application of that principle has been rather inconsistent, *see Paramount Health Sys., Inc. v. Wright*, 138 F.3d 706, 709-11 (7th Cir. 1998) (comparing this rule with the competing rule that the views of a subsequent Congress in legislative history form a hazardous basis for inferring the intent of an earlier one). And we are unaware of any Supreme Court holding in which a subsequent declaration has been used, not to discern the current meaning of a statute post-declaration, *see, e.g., Seatrain Shipbuilding Corp. v. Shell Oil Co.*, 444 U.S. 572, 595-96, 100 S. Ct. 800, 63 L.Ed.2d 36 (1980); *Red Lion Broadcasting*, 395 U.S. at 380-

III.

Appellees have not persuasively demonstrated a congressional intent to include states as defendant persons under the False Claims Act. That being so, the default rule would seem to dictate that they are not. We hesitate in resting solely on this ground, however, since the Supreme Court has never explained just how much of a showing suffices to overcome the presumption against interpreting persons to include states, and indeed on occasion has employed the rule in a somewhat diluted fashion. *See, e.g., Sims v. United States*, 359 U.S. 108, 111-12, 79 S. Ct. 641, 3 L.Ed.2d 667 (1959); *United States v. California*, 297 U.S. 175, 186, 56 S. Ct. 421, 80 L.Ed. 567 (1936); *Ohio v. Helvering*, 292 U.S. at 370-71, 54 S. Ct. 725. We think there are additional considerations, however, that resolve all doubts in New York's favor.

A.

Were we to agree with appellees that states can be defendants under the False Claims Act, we would be obliged to decide whether, as appellant New York contends, the Eleventh Amendment bars a *qui tam* suit by a private relator against a state in federal court. The Amendment states that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S.

81, 89 S. Ct. 1794, but instead to interpret the meaning of a statute *prior to the declaration*. Appellees' attempt to apply the consistent meaning canon to the 1863 Congress depends on precisely such a "retroactive clarification."

Const. amend. XI. Although it has been read to bar suits by plaintiffs not identified in the text of the amendment itself, such as citizens of the state being sued, *see Hans v. Louisiana*, 134 U.S. 1, 10-11, 10 S. Ct. 504, 33 L.Ed. 842 (1890), and foreign sovereigns, *see Principality of Monaco v. Mississippi*, 292 U.S. 313, 330-32, 54 S. Ct. 745, 78 L.Ed. 1282 (1934), it is well settled that it poses no bar to a suit by the United States against a state in federal court. The states' consent to such suits is thought to be inherent in the constitutional plan and necessary to the very permanence of the Union. *See, e.g., West Virginia v. United States*, 479 U.S. 305, 311, 107 S. Ct. 702, 93 L.Ed.2d 639 (1987); *Monaco*, 292 U.S. at 329, 54 S. Ct. 745; *United States v. Texas*, 143 U.S. 621, 641-46, 12 S. Ct. 488, 36 L.Ed. 285 (1892). Reasoning from this unobjectionable proposition, three of our sister circuits have held that, since a *qui tam* suit against a state is essentially a suit by and for the United States, the Eleventh Amendment does not preclude a *qui tam* suit in federal court. *See Stevens*, 162 F.3d at 201-03; *United States ex rel. Rodgers v. Arkansas*, 154 F.3d 865, 868 (8th Cir. 1998); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 50 (4th Cir. 1992); *see also United States ex rel. Fine v. Chevron, U.S.A., Inc.*, 39 F.3d 957, 962-63 (9th Cir. 1994), *vacated on other grounds*, 72 F.3d 740 (9th Cir. 1995) (en banc).

We think our sister circuits have paid insufficient attention to the Supreme Court's decision in *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 115 L.Ed.2d 686 (1991). In *Blatchford*, the Court held that a statute giving federal district courts original jurisdiction of suits brought by an Indian tribe involving federal law did not constitute a delegation to

the tribes of the United States' ability, free from the Eleventh Amendment bar, to sue the states as the tribes' trustee. *See id.* at 785-86. Although the Court held that Congress intended no delegation in the jurisdictional statute, the Court was dubious that such a delegation would have been constitutionally permissible:

> We doubt . . . that that sovereign exemption can be delegated-even if one limits the permissibility of delegation ... to persons on whose behalf the United States itself might sue. *The consent, "inherent in the convention," to suit by the United States—at the instance and under the control of responsible federal officers—is not consent to suit by anyone whom the United States might select*; and even consent to suit by the United States for a particular persons's benefit is not consent to suit by that person himself.

Id. at 785 (emphasis added).

It seems to us that permitting a *qui tam* relator to sue a state in federal court based on the government's exemption from the Eleventh Amendment bar involves just the kind of delegation that *Blatchford* so plainly questioned. *See Rodgers*, 154 F.3d at 869 (Panner, J., dissenting). Nor are we persuaded by the argument that the Court in *Blatchford* was concerned about a possible delegation of the United States' Eleventh Amendment exemption just because the injury to be remedied was the tribe's and not the United States'. *See Stevens*, 162 F.3d at 203. The problems inherent in expanding the states' consent to suit by the United States to suits "by anyone whom the United States might select," *Blatchford*, 501 U.S. at 785, 111 S. Ct.

2578, are no less troublesome where, as here, the injury on which the suit is premised is a pecuniary injury to the United States. One should bear in mind that the United States' ability to sue is broad; it is not limited to suits to protect the federal fisc. *See, e.g., In re Debs*, 158 U.S. 564, 584, 15 S. Ct. 900, 39 L.Ed. 1092 (1895), *disapproved of on other grounds Bloom v. Illinois*, 391 U.S. 194, 208, 88 S. Ct. 1477, 20 L.Ed.2d 522 (1968). Indeed, the United States' very ability to sue as the tribes' trustee, which was unquestioned in *Blatchford*, depended on an injury to the United States as sovereign when injury was inflicted on the tribes. *See United States v. Minnesota*, 270 U.S. 181, 194, 46 S. Ct. 298, 70 L.Ed. 539 (1926). It does not seem reasonable, therefore, to distinguish *Blatchford* as an anti-delegation principle applicable only where the "injury" is an injury to someone other than the United States. The problem in either case is whether, consistent with the constitutional plan, the United States can delegate its own exemption from the Eleventh Amendment bar to another party.

Whatever the ultimate resolution of the question, we think it presents a serious constitutional issue. It is quite a stretch to claim that such a delegation was part of the inherent constitutional design, or that the permanence of the union somehow depends on giving the United States broad latitude to permit private parties to sue the states in the federal courts on the United States' behalf. *Compare United States v. Texas*, 143 U.S. at 644-45, 12 S. Ct. 488. To assume that the United States possesses plenary power to do what it will with its Eleventh Amendment exemption is to acknowledge that Congress can make an end-run around the limits that that Amendment imposes on its legislative choices.

Imagine that Congress is contemplating a new statute, to be enacted pursuant to its Article I powers, which would create a private cause of action against the states in federal court. Since the Court's decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996), Congress would not be able to enact such a statute, irrespective of its clarity in imposing liability against the states, because Congress is without constitutional power to abrogate the states' Eleventh Amendment immunity under its Article I powers. *See id.* at 57-73, 116 S. Ct. 1114. Yet if Congress is permitted to use the *qui tam* device to create a private cause of action against the states brought on behalf and in the name of the United States, it can reach precisely the same end without constitutional impediment. *See* Jonathan R. Siegel, *The Hidden Source of Congress's Power to Abrogate State Sovereign Immunity*, 73 TEX. L. REV. 539, 556-64 (1995) (approving of this outcome); *see also Blatchford*, 501 U.S. at 785-86, 111 S. Ct. 2578 (noting that the tribe's "delegation theory" was designed to avoid the constraints on congressional abrogation of the states' Eleventh Amendment immunity). Admittedly, Congress could have imposed liability against the states if it chose to put enforcement of the statute "at the instance and under the control of responsible federal officers." *Blatchford*, 501 U.S. at 785, 111 S. Ct. 2578; *see also Seminole Tribe*, 517 U.S. at 71 n. 14, 116 S. Ct. 1114. But the quite different legislative choice of authorizing private parties to haul sovereign states into federal court against their will, ordinarily foreclosed unless Congress successfully abrogates the states' immunity, suddenly becomes an all too easy legislative option.

Long and the government would avoid the *Blatchford* delegation difficulty by asserting that in *qui tam* suits the United States is the real party in interest; a *qui tam* suit is therefore essentially a suit by and for the United States. *See, e.g., Stevens*, 162 F.3d at 202; *Milam*, 961 F.2d at 49 (concluding that the United States is the real party in interest because of "the structure of the *qui tam* procedure, the extensive benefit flowing to the government from any recovery, and the extensive power the government has to control the litigation"). This argument appears to us merely to sidestep the core problem because it ignores the *relator's* undisputed role as a party with a cause of action under the Act. The "real party in interest" rule ordinarily requires that the suit be brought by the "person who, according to the governing substantive law, is entitled to enforce the right." 6A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE & PROCEDURE § 1543, at 334 (2d ed.1990); *see* Fed R. Civ. P. 17(a) (stating that "every action shall be prosecuted in the name of the real party in interest"). There is no question that the False Claims Act gives such a right to the relator, *see* 31 U.S.C. § 3730(b) ("A person may bring a civil action for a violation of section 3729 *for the person* and for the United States Government.") (emphasis added), and the statutory right to bring suit is sufficient to satisfy the real party in interest requirement, even if the suit is brought for the benefit of some other party, *see* Fed. R. Civ. P. 17(a) (second sentence); 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1550, at 384. In any event, contrary to the suggestion of the district court, *see Long*, 999 F. Supp. at 83-84, a *qui tam* action is brought for the benefit of both the relator and the United

States, not for the benefit of the United States alone. *See* 31 U.S.C. § 3730(b) (authorizing *qui tam* suit "for the person and for the United States Government"). Nor does it make any difference that the False Claims Act requires the relator to sue "in the name of the Government," 31 U.S.C. § 3730(b), because the procedural question of in whose name the suit must be brought is distinct from the substantive legal question whether the plaintiff has a cause of action. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1544, at 340.[16]

Accordingly, we do not think the relator's technical status as a "real party in interest" is inconsistent with the conclusion of our sister circuits that the United States is a "real party in interest" as well. *See, e.g., Stevens*, 162 F.3d at 202; *Rodgers*, 154 F.3d at 868; *United States ex rel. Hyatt v. Northrop Corp.*, 91 F.3d 1211, 1217 n. 8 (9th Cir. 1996); *Milam*, 961 F.2d at 49. It is, after all, not unheard of for there to be two real parties in interest to a cause of action. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice & Procedure § 1545, at 351-53 (in cases of partial assignments, the assignor and assignee are both real parties in interest); *id.* § 1546, at 360 (same for partial subrogation). More

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[16] The district court concluded that Long's claim under the whistle-blower provision of the False Claims Act, 31 U.S.C. § 3730(h), was barred by the Eleventh Amendment because, unlike a *qui tam* suit under § 3730(b) brought in the name of the United States, a claim under § 3730(h) is a true "private right of action." *Long*, 999 F. Supp. at 92. We disagree; a *qui tam* suit under § 3730(b) is no less a cause of action, and the relator is no less a party prosecuting that action, because the action is brought in the name of the United States.

important, although we are aware of a variant of the doctrine used in a related Eleventh Amendment context, *see, e.g., Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 464, 65 S. Ct. 347, 89 L.Ed. 389 (1945) (analyzing whether a state defendant is the "real party in interest" such that a suit against a state entity, though not nominally against the state, would be barred by the Eleventh Amendment), we do not see how the doctrine can be used to convert a party with a statutory cause of action into a "nonparty-party."[17] In short, we think the real party in interest doctrine is plainly irrelevant to the Eleventh Amendment question presented in this case. *See Rodgers*, 154 F.3d at 869 (Panner, J., dissenting).

Nor do we think, as appellees suggest, that the government's control over a relator's suit alters the result. We acknowledge that the government takes the greater share of any recovery, *see* 31 U.S.C. § 3730(d)(1),(2), and that the statute gives the United States considerable control over the relator's suit, *see, e.g., id.* at § 3730(b)(2)(providing that the government can intervene in the suit as of right within sixty days after receiving the relator's complaint, evidence, and information); *id.* at § 3730(b)(1) (relator cannot dismiss his own suit without written consent of the court and the Attorney General); *id.* at § 3730(c)(3)-(4) (even if the

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[17] One of the principal concerns motivating the Eleventh Amendment inquiry into whether the state is the "real party in interest" defendant (or in other words that the actual defendant is an "arm of the state") is that an individual plaintiff's recovery will be paid out of the state treasury. *See Regents of the University of California v. Doe*, 519 U.S. 425, 117 S. Ct. 900, 904, 137 L.Ed.2d 55 (1997). That is the precise concern presented by a private relator recovering against a state defendant in a *qui tam* suit.

government does not intervene, it may monitor the proceedings and stay discovery in certain situations); *id.* at 3730(c)(3) (government can intervene at any time upon a showing of good cause); *id.* § at 3730(c)(2)(A) (government may dismiss the suit after notice to the relator and a hearing); *id.* at § 3730(c)(2)(B) (government may settle the suit with the defendant over the relator's objection if the court approves after a hearing).[18] Still, we simply do not see how the government's potential exercise of its power renders the relator any less a party. Whatever the degree of control the United States exercises, we think it is telling that, although there are some intimations to that effect, no court has actually held that the relator is not a party to the *qui tam* suit merely because of the United States' potential ability to control the prosecution of the suit.

The relator appears to remain a party whether or not the United States intervenes. In either situation, the relator's rights must be protected under the statute. *See* 31 U.S.C. § 3730(c)(3) (providing that the court may permit the United States to intervene for good cause but must not "limit[ ] the status and rights of the person initiating the action"); *id.* at § 3730(c)(1) (providing that the relator "shall have the right to continue as a party to the action," subject to certain limitations, even after the United States intervenes). This is important because the Eleventh Amendment must be satisfied for every claim in the suit, *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 121, 104 S. Ct. 900, 79

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[18] There are, however, substantial restrictions on the United States' power incorporated within these provisions. *See Stevens*, 162 F.3d at 223-24 (Weinstein, J., dissenting).

L.Ed.2d 67 (1984), and the presence of the United States as a co-plaintiff does not ordinarily remove the Eleventh Amendment bar for claims by other plaintiffs, *see id.* at 103 n. 12, 104 S. Ct. 900; *but see Rodgers*, 154 F.3d at 870 (Panner, J., dissenting) (distinguishing for Eleventh Amendment purposes between cases in which the United States intervenes from those in which it does not). But assuming *arguendo* that the Eleventh Amendment would not pose a problem in cases in which the United States actually intervenes in a suit against a state, the government did not do so in the present case. That fact, coupled with the government's intervention limited to the claim against the private defendants, suggests that the government does not lightly take on the task of probing into the internal operations of the sovereign states, and may well think it better to leave such politically unpalatable tasks for the *qui tam* relators of the world. Yet, the government wishes the option to sit back while the relator brings an action against a state, thus removing itself from direct accountability and from the subtle political pressures that might have precluded the lawsuit in the first place had the United States been more actively involved from the start. *See Stevens*, 162 F.3d at 225-29 (Weinstein, J., dissenting). That seems quite at odds with the obvious purpose of the Eleventh Amendment since such a suit is emphatically not one brought "at the instance and under the control of responsible federal officers." *Blatchford*, 501 U.S. at 785, 111 S. Ct. 2578. We seriously doubt that the government, under the Eleventh Amendment, is entitled to transfer all of the benefits that accrue to it as a plaintiff in the federal courts when it chooses to watch from the sidelines. That could be described as allowing the government to have its constitutional cake and eat it too.

It has also been contended that, despite the clear statutory language giving relators a cause of action and treating them as parties vested with rights and protections, relators should be seen instead as self-appointed government counsel. *See Stevens*, 162 F.3d at 202; *Milam*, 961 F.2d at 49 ("Congress has let loose a posse of ad hoc deputies to uncover and prosecute frauds against the government."); Siegel, *supra*, 73 TEX. L. REV. at 556-57; Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 YALE L. J. 341, 353 (1989). It has even been suggested that the relator's economic interest in the lawsuit makes him more like a contingency fee lawyer than a party. *See Stevens*, 162 F.3d at 202 (acknowledging that the *qui tam* plaintiff has an interest in the action's outcome, but stating that "his interest is less like that of a party than that of an attorney working for a contingent fee" and citing cases noting that relators' primary motivation is a monetary reward and not the public good). We simply do not understand the analogy; typically both the client and the attorney have an economic interest in litigation. In this sense, a relator looks no different to us than, let us say, an applicant for a broadcast license. It is therefore not possible to contend that the False Claims Act is an open-ended letter of engagement from the government as client to a posse of prospective attorneys. *See United States ex rel. Farrell v. SKF, USA, Inc.*, 32 F. Supp.2d 617, 617-18 (W.D.N.Y. 1999) (rejecting contention by *qui tam* defendant that, since the relator is only the United States' lawyer and the United States always remains a party litigant, the defendant was entitled to discovery from the United States even though the United States had not intervened in the suit). To accept the "private Attorneys General" characterization as anything more

than an inapt convention would run headlong into the problems of how a party with a statutory right to sue on his own behalf can be thought to be acting in a representational capacity, *see* 31 U.S.C. § 3730(b), why the client would need the court's permission to intervene in his own suit, *see id.* at § 3730(c)(3), or to dismiss the lawyer's "suit," *see id.* at § 3730(c)(2)(A), and why the lawyer's "status and rights" would be worthy of statutory protection in the event the client chooses to intervene in the lawyer's action, *see id.* at § 3730(c)(3).[19]

B.

Although, as we have indicated, we have profound doubts that the Eleventh Amendment permits this lawsuit against New York even if Congress implicitly authorized relators to bring suits against the states, we do not rest our decision on an interpretation of the Constitution. Instead, bearing in mind that we must decide this difficult constitutional issue only if the term person in the Act is interpreted as including states, and that it seems quite dubious that Congress intended that result, the appropriate course seems to us to interpret "person" as not including states.

The venerable doctrine of construing statutes in such a way as to avoid serious constitutional questions has two important prerequisites. First, the "statute must be genuinely susceptible to two constructions," and this determination must be made "after, and not before, [the

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[19] Of course, if the government actually hired a lawyer to bring its own cause of action, the Blatchford delegation problem would not arise. But as we have explained at length, that is not what the False Claims Act does.

statute's] complexities are unraveled." *Almendarez-Torres*, 118 S. Ct. at 1228; *see also United States v. Espy*, 145 F.3d 1369, 1372 (D.C. Cir. 1998); *Association of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 906, 910-11 (D.C. Cir. 1993). Furthermore, the constitutional question must be one that presents a "serious likelihood that the statute will be held unconstitutional." *Almendarez-Torres*, 118 S. Ct. at 1228; *see also Association of Am. Physicians & Surgeons*, 997 F.2d at 906 (constitutional question must be a "grave" one); *Espy*, 145 F.3d at 1372.

It is obvious from what we have said already that these requirements are satisfied in this case. As we have just explained at length, the Eleventh Amendment question is, at bare minimum, a serious one. It could not be suggested, moreover, that we are distorting the language of the statute in order to avoid a constitutional question. The more obvious reading is to exclude states from "person." The more difficult task is to demonstrate that the *inclusion* of states as defendant persons is a fair reading of the statute. There can be no objection to avoiding a constitutional question that is implicated only by a rather strained reading of the statute.

We think it relevant—if not decisive—to observe that the avoidance canon coincides in this case with two additional related canons of construction that impose upon Congress an obligation of specificity. When "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' "federal courts insist that Congress "make its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65, 109 S. Ct. 2304 (quoting

Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985)); *see also Gregory v. Ashcroft*, 501 U.S. 452, 464, 111 S. Ct. 2395, 115 L.Ed.2d 410 (1991) (linking clear statement rule with constitutional avoidance canon). The Court in *Will* derived this "clear statement" rule from the Eleventh Amendment cases requiring an explicit textual intent to abrogate a state's Eleventh Amendment immunity, but noted its applicability in a range of contexts in which Congress alters the federal-state balance of power. *See Will*, 491 U.S. at 65, 109 S.Ct. 2304.[20] In *Gregory*, the Court applied this "plain statement" principle where Congress' imposition of liability under the Age Discrimination in Employment Act would "upset the usual constitutional balance" by interfering with the states' fundamental role in defining the qualifications of their state judges. *Id.* at 460-61, 111 S. Ct. 2395; *see id.* at 464-67, 111 S. Ct. 2395 (holding that Congress did not make a sufficiently clear statement in the ADEA that state judges are within the Act's coverage). It cannot seriously be disputed that if Congress were required to make its intentions "clear and manifest," *Will*, 491 U.S. at 65, 109 S. Ct. 2304, in order to impose False Claims Act liability on the states, it has failed to do so.

Appellees contend that there is no justification for applying this clear statement rule of *Will* or *Gregory* because treating states as defendant persons would not actually alter the constitutional balance of powers between the federal and state governments. Such an

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[20] Indeed, in *Will* itself the Eleventh Amendment was not a concern because the question whether states were persons under § 1983 arose in the context of a state court case, and the Eleventh Amendment does not apply in state courts. *See Will*, 491 U.S. at 63-64, 109 S. Ct. 2304.

alteration occurs, for example, when Congress seeks to remove the states' sovereign immunity in their own courts, as in *Will*, 491 U.S. at 67, 109 S. Ct. 2304, or when Congress attempts to interfere with an essential governmental function, as in *Gregory*, 501 U.S. at 460, 111 S. Ct. 2395. Since this case arose in federal court and because the fraudulent conduct proscribed cannot be thought an essential governmental function, appellees argue that neither *Will* nor *Gregory* apply.

We are unpersuaded by various crabbed analyses of the Court's "clear statement" jurisprudence that we have seen. To characterize the relevant state function at issue, as the Second Circuit did, as *fraudulent conduct, see, e.g., Stevens*, 162 F.3d at 204 ("The States have no right or authority, traditional or otherwise, to engage in [fraudulent] conduct."), is to assume the conclusion that the function is not an essential one. Using that logic, the Court in *Gregory* would have declined to apply a clear statement rule because it is not essential for the state to discriminate against elderly judges. Appellees, for their part, describe the governmental function at issue in this case as the process by which a state receives *federal* funding-which they argue cannot possibly be described as an essential *state* function. The state, in other words, is simply a supplicant coming to the federal sovereign. That characterization, in our view, is still too narrow because the Act's imposition of liability necessarily interferes with a state's sovereign performance of a range of indisputably essential functions, such as the administration of a state education department involved in the present case. *See Ambach v. Norwick*, 441 U.S. 68, 76, 99 S. Ct. 1589, 60 L.Ed.2d 49 (1979) ("Public education, like the police function, 'fulfills a most fundamental obligation of government to

its constituency.'") (quoting *Foley v. Connelie*, 435 U.S. 291, 297, 98 S. Ct. 1067, 55 L.Ed.2d 287 (1978)); *Brown v. Board of Educ.*, 347 U.S. 483, 493, 74 S. Ct. 686, 98 L.Ed. 873 (1954) ("[E]ducation is perhaps the most important function of state and local governments."). That the federal government funds in part that function does not destroy its essentiality to the state. To accept that hypothesis, given present tax and spending mechanisms, would go a long way toward burying federalism.

The Supreme Court has applied *Gregory* as we do, focusing on the state functions necessarily affected by operation of the statute, and not exclusively on the actual conduct proscribed by Congress. *See Gregory*, 501 U.S. at 463, 111 S. Ct. 2395 (essential state function with which ADEA liability would interfere was the "authority of the people of the States to determine the qualifications of their most important government officials" in their state Constitutions); *see also Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1953-54, 141 L.Ed.2d 215 (1998) (assuming that imposition of ADA liability against state prisons would interfere with the essential state function of "exercising ultimate control over the management of state prisons"); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 544 & n. 8, 114 S. Ct. 1757, 128 L.Ed.2d 556 (1994) (applying *Gregory* to Bankruptcy Code provisions governing constructively fraudulent transfers, and explaining that the state function was not general authority over debtor-creditor law, but the "essential sovereign interest in the security and stability of title to land" necessarily affected by application of the Bankruptcy Code to foreclosure sales). We thus do not think it is appropriate to look myopically only to the state's formal submission of the claim to the govern-

ment and to ignore the underlying governmental functions to which the claim relates.[21]

Appellees similarly give an overly restrictive reading of *Will*. It is true that the Court in *Will* pointed to the states' sovereign immunity in their own courts as a supporting reason for concluding that Congress did not intend to make states persons under 42 U.S.C. § 1983. *See Will*, 491 U.S. at 66-67, 109 S. Ct. 2304. But the Court nowhere even suggested that abrogation of state sovereign immunity was the only alteration of the constitutional balance that justified use of the clear statement rule, nor did it rely on the idea of essential state functions implicit in the later decision in *Gregory*. *Will* could be read to suggest—although we are uncertain of this—that it was the very imposition of a new liability against the state that would have altered the constitutional balance of powers.

Whether or not *Will* or *Gregory* can be taken as far as we have suggested,[22] there is a second related clear

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[21] It could be argued, we suppose, that because False Claims Act liability is only triggered when the state requests money from the federal government, it brings any interference with its essential functions on itself. But we do not see any basis in *Gregory* for eliminating the need for a clear statement simply because the liability imposed is conditioned on a voluntary act by the state. The clear statement rule of *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S. Ct. 1531, 67 L.Ed.2d 694 (1981)—which requires a clear statement when Congress imposes conditions on grants of federal money—seems flatly inconsistent with such an argument.

[22] The government would have us instead limit the Court's clear statement rules because of the significant reliance interests created by Congress' and the federal agencies' assumption that states, to whom they entrusted large sums of money, are covered

statement canon that bears on our case. In cases involving congressional abrogation of a state's Eleventh Amendment immunity, the applicability of the clear statement rule is well-established and the uncertainties in defining the scope of the *Will* and *Gregory* versions of that rule disappear. *See Dellmuth v. Muth*, 491 U.S. 223, 230, 109 S. Ct. 2397, 105 L.Ed.2d 181 (1989). Appellees contend that that rule does not apply, however, because they conclude that the Eleventh Amendment is not a bar to a *qui tam* suit (and thus that no abrogation is necessary). But it seems highly artificial to conclude that Congress labors under an obligation of utmost textual specificity when it seeks to abrogate the states' Eleventh Amendment immunity when that immunity is otherwise certain, but that liability against the states—potentially implicating the Eleventh Amendment—can be imposed willy-nilly, using as imprecise a term as

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by the Act. For the proposition that reliance interests can trump clear statement rules, the government relies on *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 205-07, 112 S. Ct. 560, 116 L.Ed.2d 560 (1991) (holding that *Will* is a rule of statutory construction, not of constitutional law, and that the reliance interests created by the Court's prior decision interpreting the Federal Employers' Liability Act to include state-owned railroads warranted adherence to *stare decisis* rather than to the clear statement rule). That the Court feels obliged to disregard the clear statement rule because of reliance interests that it created through *its own* precedent is of course quite different from the government's contention. Any reliance interests in this case are not the judiciary's doing, but rather stem from the legislature's and the federal agencies' assumption, based on weak post-enactment legislative history, that states were, or ought to be, covered by the Act. Since Congress easily could have included states within the definition of person if it so intended, the government can hardly be heard to complain now (on behalf of Congress) that Congress, in effect, wrote the states a blank check.

"person." We think there is significant conceptual overlap—though admittedly not an identity—between the abrogation inquiry and the statutory construction question whether Congress intended to include states as defendant persons. The Supreme Court's conclusion that Congress has failed to abrogate with the requisite specificity is often based on Congress' failure explicitly to provide for suits against the states in federal court—the precise failing of the False Claims Act that raises the question in this appeal. *See, e.g., Dellmuth*, 491 U.S. at 231-32, 109 S. Ct. 2397; *Atascadero State Hosp.*, 473 U.S. at 245-46, 105 S. Ct. 3142. So although we recognize that the Eleventh Amendment's clear statement rule has always been applied to an abrogaion inquiry—rather than to a threshold question as to whether the Eleventh Amendment applies—we do not think it wholly irrelevant to the latter.

Appellees' argument against using the Eleventh Amendment's clear statement rule follows from their *prior* conclusion that the Eleventh Amendment does not apply to this case. Appellees therefore assume that states are persons for the purpose of rejecting New York's Eleventh Amendment defense, and then proceed to reject the Eleventh Amendment's clear statement rule when actually interpreting the statute previously assumed to include states—sort of a divide and conquer strategy. The statutory construction issue is, however, inextricably linked with the jurisdictional one, which is precisely why we decline to assume that states are persons in order to conduct an Eleventh Amendment inquiry that could be avoided if the assumption were not made in the first place. We think the correct resolution is to read the Act in such a way that avoids the serious constitutional question whether the Elev-

enth Amendment bars *qui tam* suits against the state in federal court. In so doing, we rely on the constitutional avoidance canon buttressed by the family of "clear statement" rules applicable when Congress attempts to legislate in the way that appellees contend it has legislated.[23]

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In the end it comes to this: if we must decide whether states constitutionally can be defendants in federal court under the Act, Congress must make its intent clear. The decision of the district court is therefore reversed.

So ordered.

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[23] New York would also have us apply the clear statement rule of *Pennhurst*, 451 U.S. at 17, 101 S. Ct. 1531, under which Congress must unambiguously set forth conditions it imposes on the grant of federal money when it exercises its spending power. Because we have enough—more than enough—clear statement rules to resolve this case, we need not decide whether False Claims Act liability can be seen as a condition imposed on a grant of federal money.

APPENDIX B

UNITED STATES COURT OF APPEALS DISTRICT OF COLUMBIA CIRCUIT

Nos. 98-5133, 98-5149 AND 98-5150

UNITED STATES OF AMERICA, EX REL. RONALD E. LONG, APPELLEE/CROSS-APPELLANT

v.

SCS BUSINESS & TECHNICAL INSTITUTE, INC., ET AL., APPELLEES

STATE OF NEW YORK, APPELLANT/CROSS-APPELLEE

v.

ATTORNEY GENERAL OF THE UNITED STATES, INTERVENOR

[April 30, 1999]

SUPPLEMENTAL OPINION

Before: WALD, SILBERMAN, and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SILBERMAN.

SILBERMAN, Circuit Judge:

In the same week that our opinion issued, the Fifth Circuit held that the Eleventh Amendment bars a False Claims Act *qui tam* suit against a state in federal court. *See United States ex rel. Foulds v. Texas Tech University*, 171 F.3d 279 (5th Cir. 1999). The court thought it was obliged to decide that issue before reaching the question we decided—whether the statute provides for a *qui tam* action against a state—because the Eleventh Amendment issue is jurisdictional. Although we certainly discussed the serious nature of the Eleventh Amendment issue as it bore on our order of decision, we did not consider whether, as a matter of judicial authority, we too were *obliged* to decide that issue. Since our sister circuit implicitly challenged our jurisdiction—even though no party before us did—and our mandate has not issued, under these unusual circumstances, we think it appropriate to issue this supplemental opinion to explain why we believe we should stick with the order of decision we adopted.

The Fifth Circuit reasoned as follows: since the question whether a relator can sue a state under the Act is a cause of action or merits question, and since the question whether a federal court can hear such a suit under the Eleventh Amendment is a jurisdictional one, the latter must be resolved before the former. *See id.* at 286. The principal authority that the Fifth Circuit relied on is *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L.Ed.2d 210 (1998), in which the Supreme Court held that a question of Article III standing must be decided before the statutory question whether a cause of action exists. *See id.* at ____ -____, 118 S. Ct. at 1012-16. In so holding,

the Court rejected the doctrine of "hypothetical jurisdiction," under which lower courts—including this one, *see, e.g., Cross-Sound Ferry Servs., Inc. v. ICC*, 934 F.2d 327, 333 (D.C. Cir. 1991)—had assumed jurisdiction in order to reach the merits, where the merits question was easier and the prevailing party on the merits would be the same as the prevailing party were jurisdiction denied. *See Steel Co.*, 523 U.S. at ____, 118 S. Ct. at 1012 (disapproving of *Cross-Sound* and other lower court decisions). The doctrine, the Court said, is flatly inconsistent with core principles limiting the role of Article III courts: "For a court to pronounce upon the meaning or the constitutionality of a state or federal law when it has no jurisdiction to do so is, by very definition, for a court to act ultra vires." *Id.* at ____, 118 S. Ct. at 1016.

We did not address this *Steel Co.* question in our opinion, we confess, because we did not focus on it. Indeed, New York—whose immunity from suit is at stake—specifically urged us, apparently unlike Texas in *Foulds*, to decide the statutory question first on the ground that nonconstitutional grounds should be considered before constitutional ones. Admittedly, we ordinarily are obliged to raise jurisdictional questions on our own, so the parties' litigating tactics would not excuse our oversight. Still, the Eleventh Amendment bar on suits against the states in federal court is not a garden variety jurisdictional issue. Although the Amendment speaks in terms of the limits of the judicial power, *see* U.S. Const. Amend. XI ("The Judicial power of the United States shall not be construed to extend . . . ."), a state can waive its Eleventh Amendment defense and consent to suit in federal court, and the Supreme Court has held that there is no obligation for

the Court to raise the issue *sua sponte*. *See Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, ____ - ____, 118 S. Ct. 2047, 2052-53, 141 L.Ed.2d 364 (1998) (citing *Atascadero State Hsp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985) and *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 515 n. 19, 102 S. Ct. 2557, 73 L.Ed.2d 172 (1982)).

To be sure, the Court has also held that the "Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court," *Edelman v. Jordan*, 415 U.S. 651, 678, 94 S. Ct. 1347, 39 L.Ed.2d 662 (1974); *see Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1216 (D.C. Cir. 1997), and indeed can be raised for the first time in the Supreme Court, *see Ford Motor Co. v. Department of Treasury*, 323 U.S. 459, 467, 65 S. Ct. 347, 89 L.Ed. 389 (1945). Given these somewhat conflicting rules, *see Schacht*, 524 U.S. at ____, 118 S. Ct. at 2055 (Kennedy, J., concurring), the Court has frankly recognized that the Eleventh Amendment is a rather peculiar kind of "jurisdictional" issue. *See Calderon v. Ashmus*, 523 U.S. 740, ____ n. 2, 118 S. Ct. 1694, 1697 n. 2, 140 L.Ed.2d 970 (1998) ("While the Eleventh Amendment is jurisdictional in the sense that it is a limitation on the federal court's judicial power, and therefore can be raised at any stage of the proceedings, we have recognized that it is not coextensive with the limitations on judicial power in Article III."); *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 267, 117 S. Ct. 2028, 138 L.Ed.2d 438 (1997) ("The Amendment, in other words, enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject-matter jurisdiction."). The Court's most recent opinion noted that

the question whether Eleventh Amendment immunity is a matter of subject matter jurisdiction is an open one. *See Schacht*, 524 U.S. at ____, 118 S. Ct. at 2054.

New York's explicit request that we first decide the statutory question could therefore be seen as a kind of agreement to assert its Eleventh Amendment defense *only* if it loses on the statutory one (a "springing" defense, as it were). As the Supreme Court has recently made clear, "[t]he Eleventh Amendment . . . does not automatically destroy original jurisdiction," but instead "grants the State a legal power to assert a sovereign immunity defense *should it choose to do so.*" *Schacht*, 524 U.S. at ____, 118 S. Ct. at 2052 (emphasis added). A state can waive its immunity from suit in the context of a litigation, *see, e.g., Ford Motor Co.*, 323 U.S. at 467-69, 65 S. Ct. 347, as long as it does so unequivocally, *see Atascadero*, 473 U.S. at 246-47, 105 S. Ct. 3142. Although there are difficult questions about whether the state's attorneys must be authorized by state law to waive the state's immunity, and about whether such authorization, if needed, has been granted, *compare id.* (suggesting that such authorization is necessary) *with Schacht*, 524 U.S. at ____ - ____, 118 S. Ct. at 2055-56 (Kennedy, J., concurring) (questioning whether in the removal context specific authorization is required), it may well be that New York's approach amounts to a partial consent to suit on the statutory question—subject to a later Eleventh Amendment defense. And if so, we might be *obligated* to decide the statutory question first.

But even if we were not so obligated, we think that we are at least permitted to do so. Had New York chosen not to assert its Eleventh Amendment defense

below, or even before us, it would not have been precluded from raising it thereafter. *See Calderon*, 523 U.S. at ____ n. 2, 118 S. Ct. at 1697 n. 2 (Eleventh Amendment "can be raised at any stage of the proceedings"); *but cf. Schacht*, 524 U.S. at ____, 118 S. Ct. at 2055 (Kennedy, J., concurring) (criticizing this rule because "permitting the belated assertion of the Eleventh Amendment bar . . . allow[s] States to proceed to judgment without facing any real risk of adverse consequences"). Unless that defense is asserted by the state, a court is arguably not obliged to raise the issue itself since the Supreme Court has made clear that the usual obligation to raise jurisdictional issues *sua sponte* does not apply (at least to the Court itself) in Eleventh Amendment cases. *See Patsy*, 457 U.S. at 515 n. 19, 102 S.Ct. 2557.[1] Therefore New York's litigation strategy—an Eleventh Amendment argument in the alternative—suggests that, at least, we are entitled to reverse the *Steel Co.* order. After all, *Steel Co.*'s rule is premised on a court's lack of power to reach the merits without establishing its jurisdiction. In the Eleventh Amendment context, where a court lacks power only if a state claims that it does, it is arguable that we have no obligation to decide the Eleventh Amendment issue first if the state does not demand that we do so.

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[1] Whether the *Patsy* rule relieves lower courts of the *sua sponte* obligation to raise the Eleventh Amendment issue is a matter of some controversy. *See Coolbaugh v. Louisiana*, 136 F.3d 430, 442 n. 5 (5th Cir. 1998) (Smith, J., dissenting) (collecting cases and authorities). We have raised an Eleventh Amendment question on our own in a prior case, *see Morris v. Washington Metropolitan Area Transit Auth.*, 702 F.2d 1037, 1040 (D.C. Cir. 1983), but do not appear ever to have held whether we must do so, notwithstanding *Patsy*.

Moreover, the quasi-jurisdictional or "hybrid" status of the Eleventh Amendment, *see Schacht*, 524 U.S. at ____, 118 S. Ct. at 2055 (Kennedy, J., concurring), raises questions about *Steel Co.*'s applicability in this context, quite apart from New York's request that we interpret the statute first. Since the Eleventh Amendment at most "partakes of the nature of a jurisdictional bar," *Edelman*, 415 U.S. at 678, 94 S. Ct. 1347, it seems fair to ask whether the Eleventh Amendment is sufficiently jurisdictional to require us to decide a state's claim of Eleventh Amendment immunity before turning to the merits. One indication to the contrary is *Calderon*, in which the Supreme Court decided that it "must first address" whether a particular action for a declaratory judgment was an Article III case or controversy before deciding the Eleventh Amendment question on which *certiorari* had been granted, observing that the Eleventh Amendment is "not co-extensive with the limitations of judicial power in Article III." *Calderon*, 523 U.S. at ____ & n. 2, 118 S. Ct. at 1697 & n. 2. As between two jurisdictional issues, there ordinarily is no obligation to decide one before the other. *See Steel Co.*, 523 U.S. at ____ n. 3, 118 S. Ct. at 1015 n. 3; *In re Minister Papandreou*, 139 F.3d 247, 255 (D.C. Cir. 1998) (stating that dismissing on nonmerits grounds such as personal jurisdiction or forum non conveniens, before deciding subject-matter jurisdiction, is permissible under *Steel Co.*).[2] That the Court in *Calderon* thought itself *obliged* to decide the case or controversy

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[2] The Fifth Circuit has concluded otherwise, holding that in the removal context, a district court must decide subject matter jurisdiction before personal jurisdiction. *See Marathon Oil Co. v. Ruhrgas*, 145 F.3d 211, 215-25 (5th Cir.) (en banc), *cert. granted*, ___ U.S. ___, 119 S. Ct. 589, 142 L.Ed.2d 532 (1998).

question first suggests that the Eleventh Amendment, a less than pure jurisdictional question, need not be decided before a merits question. One former judge of this court, in a concurring opinion criticizing the hypothetical jurisdiction doctrine later rejected in *Steel Co.*, pointed in that direction. *See Cross-Sound Ferry*, 934 F.2d at 341 (Thomas, J., concurring in part and concurring in the denial of petition) (reasoning that the rule requiring consideration of jurisdictional issues before non-jurisdictional issues might not apply if "the ground passed over sufficiently, though not entirely, 'partakes of the nature' of a merits ground, or if the ground rested upon 'sufficiently,' though not entirely, 'partakes of the nature of a jurisdictional bar'" (quoting *Edelman*, 415 U.S. at 678, 94 S. Ct. 1347)).

Another difficulty in applying *Steel Co.* here is that classifying the statutory question in an Eleventh Amendment case as a "cause of action" or merits question is, though technically accurate, somewhat misleading. The determination of whether a particular action is properly asserted against a state is also a kind of logical prerequisite to the jurisdictional inquiry. The Eleventh Amendment only bars a federal court from hearing a "suit in law or equity, commenced or prosecuted against one of the United States," and so it would seem perfectly appropriate—perhaps even necessary—for courts to determine whether there is even such a suit before the court. That kind of inquiry—sometimes classified as "jurisdiction to determine our jurisdiction," *Nestor v. Hershey*, 425 F.2d 504, 511 (D.C. Cir. 1969) (inquiring whether student deferment sought was mandated by statute or within the discretion of the draft board, as jurisdiction existed only for the former)—is fairly common, even though the rulings

made in determining jurisdiction are made without certainty that jurisdiction actually exists. Occasionally, as in this case, what a court says about an issue of statutory interpretation that logically precedes the ultimate jurisdictional determination removes any contention that the court's jurisdiction is in question. *See, e.g., Webster v. Doe*, 486 U.S. 592, 603-04, 108 S. Ct. 2047, 100 L.Ed.2d 632 (1988) (using clear statement principles and the constitutional avoidance canon to hold that statutory provision did not, despite language indicating that the statute was committed to agency discretion, preclude judicial review of constitutional claims).

If the Eleventh Amendment were a statutory provision stripping the federal courts of jurisdiction, the inquiry whether the case before the court was of the kind that the statute forbade would be a fairly routine form of jurisdictional analysis.[3] Accordingly, in

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[3] One analogy is cases involving the Norris-LaGuardia Act's bar on federal courts issuing certain injunctions in labor disputes. *See* 29 U.S.C. § 104 (1994) ("No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute [from doing certain acts]."). Not surprisingly, the Supreme Court has had to interpret that provision, together with the provision defining it, *see id.* at § 113 ("A case shall be held to involve or grow out of a labor dispute when the case involves persons who are engaged in the same industry, trade, craft, or occupation. . . ."), to determine whether particular kinds of cases fall within the jurisdictional bar. *See, e.g., Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employees*, 481 U.S. 429, 440-44, 107 S .Ct. 1841, 95 L.Ed.2d 381 (1987) (rejecting restrictive interpretation of Norris-LaGuardia Act, under which a "labor dispute" would only include disputes in which the picketed employer is "substantially aligned" with the primary

determining whether the Eleventh Amendment bars a particular suit, federal courts must decide a variety of issues that relate to the question whether the suit is actually one brought against the state, and do so before jurisdiction is finally resolved. *See, e.g., Regents of the University of California v. Doe*, 519 U.S. 425, 429-30 & n. 5, 117 S. Ct. 900, 904 & n. 5, 137 L.Ed.2d 55 (1997) (noting that determining whether a state agency is an "arm of the state" for Eleventh Amendment purposes, such that the suit is one against the state itself, involves an analysis of the state law provisions that define the agency's character); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55-57, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996) (analyzing Indian Gaming Regulatory Act for the purpose of determining if Congress, consistent with Eleventh Amendment abrogation requirements, set forth a clear statement of its intent to provide for suits against the states in federal court, and concluding that it did); *Hafer v. Melo*, 502 U.S. 21, 24 n. *, 30-31, 112 S. Ct. 358, 116 L.Ed.2d 301 (1991) (discussing, although not resolving, competing methods for determining whether a suit for monetary damages is against a state official in his or her official capacity, and thus against

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employer); *United States v. United Mine Workers of America*, 330 U.S. 258, 269-89, 67 S. Ct. 677, 91 L.Ed. 884 (1947) (interpreting general language of §§ 104 and 113 to exclude the United States, such that where the United States seizes actual possession of mines or other facilities and operates them, and where the United States is the employer of the workers, the Norris-LaGuardia Act does not apply); *id.* at 250-51, 67 S. Ct. 677 (holding that district court properly issued restraining order to preserve existing conditions while it determined whether it had jurisdiction to issue injunctive relief, and that it had power to punish violations of its orders as criminal contempt before the jurisdictional question was resolved).

the state itself, or against a state official in his or her personal capacity, to which the Eleventh Amendment does not apply).

Still, it might be thought that the "jurisdiction to determine jurisdiction" concept is not wholly satisfactory because whether states are persons under the False Claims Act is *also* a cause of action question (which is what the Fifth Circuit emphasized). But even if the cause of action aspect of the statutory question takes it outside the "jurisdiction to determine jurisdiction" doctrine, two additional considerations justify the approach we have taken.

As our discussion already indicates, the "merits" question is, in the Eleventh Amendment context, inextricably related to the "jurisdictional" question. We noted this relationship in our opinion in explaining why the Eleventh Amendment's clear statement rule, ordinarily applied to an abrogation inquiry, is relevant in determining whether there is a cause of action against the states. Even if we were to assume that states are defendant persons, and then actually to decide that the Eleventh Amendment applied, we would then have to ask whether, for abrogation purposes, the statute contains a clear statement that states are to be defendants—which is more-or-less the same statutory analysis that we previously undertook. This can be seen in the Fifth Circuit's opinion, where the court held that the state's Eleventh Amendment immunity was not abrogated because the Act did not contain the requisite clear statement. *See Foulds*, 171 F.3d at 292. The only real difference between the Fifth Circuit's analysis of the statute and our own is that the Fifth Circuit had to

actually hold that the Eleventh Amendment applied—a serious constitutional issue—in order to get there.

We think this close relationship between the statutory and "jurisdictional" issues, even putting aside "jurisdiction to determine jurisdiction," provides an independent ground on which to distinguish *Steel Co.* The relationship between these two issues is quite different from the relationship between an ordinary "cause of action" question and a pure jurisdictional issue such as standing. The Court in *Steel Co.* rejected the contention that merits questions could be decided before constitutional standing questions because the Article III redressability requirement, for example, "has nothing to do with the text of the statute relied upon" (except with regard to entirely frivolous claims). *Steel Co.*, 523 U.S. at ____ n. 2, 118 S. Ct. at 1013 n. 2. By contrast, the Court explained why merits questions can be decided before statutory or prudential standing questions: the two questions overlap to such an extent that it would be "exceedingly artificial to draw a distinction between the two." *Id.* If an inextricable relationship between statutory standing and the merits permits a court to decide the merits first, the same order would seem appropriate for the two claims before us.

In addition, we do not think our approach even implicates the concerns underlying the Supreme Court's rejection of "hypothetical jurisdiction" because the statutory question is logically antecedent to the Eleventh Amendment question (even if it were not thought an aspect of "jurisdiction to determine jurisdiction"). We have not chosen to decide a pure (and relatively easier) merits question on the *assumption* that we have

jurisdiction—the paradigm of the hypothetical jurisdiction model. When a court decides, as we do, that a statute does not provide for a suit against the states, there is no risk at all that the court is issuing a hypothetical judgment—an advisory opinion by a court whose very power to act is in doubt. *See Steel Co.*, 523 U.S. at ____, 118 S. Ct. at 1016. Rather, the conclusion that the statute does not provide for suits against the states in federal court is, in effect, a resolution of the jurisdictional question, in that the Eleventh Amendment can no longer be said to apply (which is quite different from saying, as courts do under the hypothetical jurisdiction doctrine, that jurisdiction does not matter because the same party arguing a lack of jurisdiction prevails on the merits). The Supreme Court recently adopted precisely this reasoning in deciding a class action certification issue before an asserted "array of jurisdictional barriers," including ripeness, standing, and subject matter jurisdiction. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, ____, 117 S. Ct. 2231, 2244, 138 L.Ed.2d 689 (1997). The Court said that, because resolution of the class certification issues was "logically antecedent to the existence of any Article III issues, it [was] appropriate to reach them first." *Id.* The Fifth Circuit's view instead is that a court must *assume* that states are defendants under the Act and address the Eleventh Amendment question at the outset, lest the court give an interpretation of the statute that it has no power to give. *See Foulds*, 171 F.3d at 288 ("[I]f the Eleventh Amendment removes our jurisdictional authority to hear [the] case, we have no power to determine whether the False Claims Act creates a cause of action against states. . . ."). But such an approach ostensibly avoids the evils of "hypothetical jurisdiction" (not really at issue) in favor of

deciding a purely hypothetical jurisdictional issue—that is, a jurisdictional issue that arises *solely by virtue* of the statutory question assumed. Since the Eleventh Amendment issue in this case "would not exist but for" that assumption, *Amchem*, 521 U.S. at ____, 117 S. Ct. at 2244 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 623 (3d Cir. 1996)), we think it is appropriate for us to decide the logically prior issue first.[4]

Perhaps most important, our reasoning is confirmed by several Eleventh Amendment cases in which the Supreme Court itself has decided "cause of action" questions before turning to the Eleventh Amendment. *See, e.g., Hafer*, 502 U.S. at 21-30, 112 S. Ct. 358 (holding that state officials sued in their individual capacities are persons under 42 U.S.C. § 1983, and then holding that the Eleventh Amendment presents no bar to such a suit); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391, 398-402, 99 S. Ct. 1171, 59 L.Ed.2d 401 (1979) (deciding that a claim against an interstate compact that required federal approval was a claim alleging a deprivation of constitutional rights "under color of state law" within the meaning of § 1983, and then deciding that the compact was not entitled to Eleventh Amendment immunity)[5]; *Monell v. Depart-*

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[4] Of course, we recognize some tension between *Amchem* and *Steel Co.*, in that a cause of action question is, in a sense, logically antecedent to jurisdiction too: without a cause of action, the question whether a party satisfies jurisdictional requirements would not arise. Yet *Steel Co.* clearly requires a court to decide jurisdiction first. But the Court did not cast any doubt on *Amchem* in *Steel Co.*, and we think logical priority, as in *Amchem*, should control here.

[5] *Lake Country Estates* went so far as to state that this order of decision was *required*. *See Lake Country Estates*, 440 U.S. at

ment of Social Servs., 436 U.S. 658, 664-90 & n. 54, 98 S. Ct. 2018, 56 L.Ed.2d 611 (1978) (deciding that municipalities are persons under § 1983 and, in conclusion, noting that the Eleventh Amendment would not bar such suits to the extent that a municipality is not considered a part of the state for Eleventh Amendment purposes); *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 278-80, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977) (deciding first that the contention that municipalities were not persons under § 1983 was a merits question that had been waived, and then deciding that the Eleventh Amendment does not bar a suit against a municipality in federal court); *see also Doe v. Chiles*, 136 F.3d 709, 713-21 (11th Cir. 1998) (deciding first that a provision of the Medicaid Act created a federal right to reasonably prompt provision of assistance enforceable under § 1983, and only then concluding that the suit was not barred by the Eleventh

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398, 99 S. Ct. 1171 ("Before addressing the immunity issues [of which the Eleventh Amendment was one], we must consider whether petitioners properly invoked the jurisdiction of a federal court [under 28 U.S.C. § 1331]."). Of course, as the Court went on to explain, the question whether a plaintiff has a federal cause of action sufficient to create jurisdiction under § 1331 is not itself a jurisdictional argument (except in the rare circumstances in which the cause of action is frivolous, *see Steel Co.*, 523 U.S. at ____, 118 S. Ct. at 1010 (citing *Bell v. Hood*, 327 U.S. 678, 682, 66 S .Ct. 773, 90 L.Ed. 939 (1946))). *See Lake Country Estates*, 440 U.S. at 398, 99 S. Ct. 1171 ("[R]espondents' 'jurisdictional' arguments are not squarely directed at jurisdiction itself, but rather at the existence of a remedy for the alleged violation of their federal rights."). Still, after identifying the argument as a cause of action argument, the Court resolved that issue before even turning to the Eleventh Amendment question. If the Fifth Circuit were right, the Court should have assumed the cause of action existed once it satisfied itself that the claim was not a jurisdictional one.

Amendment). Though these cases pre-date *Steel Co.*, we think they lend considerable support—albeit implicit—to our approach.

On the other hand, the Court in *Welch v. Texas Department of Highways and Public Transportation*, 483 U.S. 468, 107 S. Ct. 2941, 97 L.Ed.2d 389 (1987), decided an Eleventh Amendment abrogation question and specifically reserved the question whether the statute created a cause of action. *See id.* at 476 n. 6, 107 S. Ct. 2941 ("Because Eleventh Amendment immunity 'partakes of the nature of a jurisdictional bar,' we have no occasion to consider the State's additional argument that Congress did not intend to afford seamen employed by the States a remedy under the Jones Act" (quoting *Edelman*, 415 U.S. at 678, 94 S. Ct. 1347)). This decision is hardly support for our position. But we do not think the Court's comment that it had "no occasion" to consider the cause of action question fairly should be read as a holding that cause of action questions *must* be decided second. *See also Petty v. Tennessee-Missouri Bridge Com'n*, 359 U.S. 275, 277-83, 79 S.Ct. 785, 3 L.Ed.2d 804 (1959) (holding that the two states had waived their Eleventh Amendment immunity from suit in an interstate compact, and only then deciding that interstate compacts were not exempt from the term "employer" in the Jones Act, but giving no indication that that order of decision was required). If that were so, *Welch* would be flatly inconsistent with the cases cited above. Again, the Court in *Welch* referred to the quasi-jurisdictional nature of the Eleventh Amendment—that it "partakes" of the nature of a jurisdictional bar—which of course suggests that the order of decision adopted was not a mandatory one.

Nor do we think, as did the Fifth Circuit, *see Foulds*, 171 F.3d at 286, that *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 111 S. Ct. 2578, 115 L.Ed.2d 686 (1991), is to the contrary. The Supreme Court did note in *Blatchford* that, given the Eleventh Amendment bar, it would not express a view about whether the respondent was a "tribe" within the meaning of the statute in question, *see Blatchford*, 501 U.S. at 788 n. 5, 111 S. Ct. 2578. But the statutory question was not a "cause of action" question at all but rather a question concerning the jurisdictional statute under which the respondent had sued, *see* 28 U.S.C. § 1362 (providing for federal court jurisdiction for suits by tribes involving federal law). At most, the Court in *Blatchford*, for reasons not entirely clear to us, decided the case on Eleventh Amendment jurisdictional grounds instead of addressing a purely statutory jurisdictional argument—whether the tribe had even established jurisdiction in the first place as a "tribe" under § 1362—that could have made unnecessary its various constitutional holdings. *See id.* at 779-82, 111 S. Ct. 2578 (holding that suits by tribes are barred by the Eleventh Amendment); *id.* at 783-86, 111 S. Ct. 2578 (holding that § 1362 did not effect a delegation of the United States' exemption from the Eleventh Amendment bar to tribes); *see id.* at 786-88, 111 S. Ct. 2578 (holding that § 1362 did not abrogate the states' Eleventh Amendment immunity).[6] And again, while there does not appear to be a

[6] The Ninth Circuit, interestingly enough, had decided the statutory jurisdictional question before turning to the Eleventh Amendment issues. *See Native Village of Noatak v. Hoffman*, 896 F.2d 1157, 1160-61 (9th Cir. 1990), *rev'd*, 501 U.S. 775, 111 S. Ct. 2578, 115 L.Ed.2d 686 (1991). The Supreme Court obviously chose a different order, but did not in any way purport to reject this aspect of the Ninth Circuit's approach.

requirement that some jurisdictional grounds be decided before others, *see Steel Co.*, 523 U.S. at ____ n. 3, 118 S. Ct. at 1015 n. 3, the Court's statement in *Calderon* that it was required to decide a case or controversy question before reaching the Eleventh Amendment, *see Calderon*, 523 U.S. at ——, 118 S. Ct. at 1697, casts considerable doubt on *Blatchford*'s order of decision. In any event, *Blatchford* certainly cannot be said to mandate the Fifth Circuit's view that the Eleventh Amendment issue must always be decided first.

We have taken pains to discuss the issue that the Fifth Circuit identified because of its importance. Although the issue is complex, and the case law not altogether clear, we are confident that no authority or principle *prohibits* our approach. And because it has the significant virtue of avoiding a difficult constitutional question, we think it is also the preferable one.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

No. CIV. A. 92-2092 (EGS)

UNITED STATES OF AMERICA EX REL.
RONALD E. LONG, PLAINTIFF/RELATOR

v.

SCS BUSINESS & TECHNICAL
INSTITUTE, ET AL., DEFENDANTS

[Filed March 26, 1998]

MEMORANDUM OPINION & ORDER

SULLIVAN, District Judge.

Ronald E. Long ("Long" or "relator") brought this action as a relator on behalf of the United States alleging violations of the False Claims Act ("FCA" or "the Act"), 31 U.S.C. §§ 3729-3733, and on his own behalf pursuant to 42 U.S.C. § 1983. Long named as defendants SCS Business & Technical Institute, Inc. ("SCS"), Mohammed (a.k.a. Michael) Alharmoosh, President of SCS, Kamal Alsultany, principal owner and Chairman of the Board of SCS, the State of New York ("New York"), and Joseph P. Frey ("Frey"). Pursuant to the *qui tam* provisions of the FCA, the complaint was immediately put under seal. *See* 31 U.S.C. § 3730(b)(2). The government intervened in July 1995, and the Department of Justice filed a first amended

complaint against SCS, Michael Alharmoosh, and Kamal Alsultany in September 1995.[1] The government declined, however, to intervene against New York and Frey. Long then filed his second amended complaint in June 1996.

Pending before the Court are defendant New York's and defendant Joseph P. Frey's motions to dismiss relator Long's second amended complaint for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted, or, in the alternative, to dismiss Counts I and II for failure to plead fraud with particularity.

I. FACTUAL ALLEGATIONS

Long, relator and plaintiff in this action, served as Coordinator of Investigations and Audit for the Bureau of Proprietary School Supervision ("BPSS") of the New York State Department of Education ("NYSED") from August 21, 1989 to April 8, 1992. BPSS is the state agency that regulates proprietary schools in New York. Frey was Long's supervisor at BPSS. SCS managed five proprietary schools in New York: two in Brooklyn, and one each in the Bronx, Queens, and Manhattan.

Long's second amended complaint contains three counts against New York and Frey. Count I alleges that New York, Frey, and SCS formed a conspiracy to

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[1] Together with Mr. Alsultany, the government also named as defendants Ms. Marguerite Alsultany, Casablanca Resorts Development of Anguilla, Ltd., Casablanca Resorts, Ltd., Intervest International Holding Corporation, and Intervest Holding Corporation (collectively, the "Alsultany and Caribbean Defendants"). In April 1996, the government filed a second amended complaint and, at that time, Ms. Sylvana Alharmoosh was added as a defendant.

have false claims paid by the United States in violation of 31 U.S.C. § 3729(a)(3). Count II alleges that New York and Frey caused false claims and reports to be presented to the United States for payment in violation of 31 U.S.C. § 3729(a)(1) and (2). Count II also alleges that New York and Frey were unjustly enriched as a result of the payments they received from SCS. Count III alleges that New York and Frey harassed and wrongfully discharged Long in violation of 31 U.S.C. § 3730(h) and 42 U.S.C. § 1983.

As Coordinator of Investigations for BPSS, Long directed an investigation of SCS beginning in September 1989. SCS allegedly received federal funding under a variety of federal programs for student financial assistance.[2] Long has alleged that the investigation he coordinated uncovered a variety of fraudulent policies and acts by SCS that resulted in SCS receiving federal moneys. This fraud included allegedly falsifying enrollment-eligibility scores, training low-level SCS staff how to falsify records, assigning students to courses for which they were ineligible and in which they were incapable of participating, and refusing to make required refunds to students. BPSS responded to Long's investigation by instituting administrative proceedings against SCS. In February 1992, BPSS issued an "Order to Show Cause" and a "Bill of Particulars" alleging that SCS had engaged in a number of violations of New York law. BPSS and SCS reached a settlement in March 1992.

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[2] These programs include Pell Grants, Supplemental Educational Opportunity Grants, PLUS/SLS loans, and federally-guaranteed Stafford Loans.

Long alleges, however, that this was a "sweetheart" settlement because the violations upon which it was based were confined to actions of low-level personnel and to a small number of violations at one school, even though, according to Long, New York officials, including Frey, knew that the fraud was occurring at more than one school and that it included actions by SCS management. Long further alleges that as a result of this settlement, New York falsely represented to the federal government that SCS was no longer engaging in fraud, and that New York was monitoring SCS.

Central to Long's claim is that BPSS allegedly received a share of the federal funding that SCS fraudulently obtained. BPSS allegedly received this share through tuition assessments and fines that SCS paid for violations of state law. Long alleges that BPSS's share of SCS's federal funding was so large that SCS was one of BPSS's major sources of funding. Further, Long alleges that as a result of BPSS's interest in SCS's continued operation, BPSS engaged in two illegal activities: it limited Long's investigation and it ignored evidence that SCS continued to present fraudulent claims.

First, Long alleges that BPSS placed limitations on Long's investigation of SCS resulting in the "sweetheart" settlement with SCS which allowed SCS to continue to fraudulently receive federal moneys. Long alleges that BPSS placed the following limitations on his investigation of SCS: reducing the number of incidents of alleged fraud he was authorized to investigate, rejecting evidence that SCS management and owners were involved in the fraud, limiting the number of schools he was authorized to investigate, and placing

limitations on his documentation of evidence. Further, Long alleges that BPSS refused to investigate information Long had gathered indicating that SCS believed it was protected by its contacts in BPSS. Long also alleges that in October 1991, Frey specifically prohibited Long from investigating evidence of fraud by SCS management and owners.

After the 1992 settlement with SCS, Long alleges that BPSS ignored evidence that SCS continued to receive federal moneys on a fraudulent basis in order to allow SCS to continue receiving federal moneys. According to Long, New York officials, including Frey, falsely represented to the federal government that SCS was not engaged in fraud and that BPSS was continuing its investigation when in fact it was not. Moreover, Long alleges that New York officials, including Frey, indicated to the federal government in the 1992 settlement that there was no indication of widespread fraud nor of involvement by management, even though BPSS knew this was false.

Long asserts that he refused to follow his superiors' instructions regarding the investigation of SCS and that, as a result, in November 1991, Frey informed him that he would be demoted with a loss of pay effective April 8, 1992, if Long had not resigned by that date. Long further alleges that in December 1991, he contacted the FBI to inform them of the evidence of fraud that he had gathered, and that he felt BPSS's limitations on his investigation were a result of the agency's interest in continuing to receive a share of the federal moneys that SCS received. According to Long, the FBI then launched an investigation (the Court assumes of SCS) in which Long assisted the FBI by obtaining

evidence from SCS. Long allegedly reported his cooperation with the FBI to Frey. On January 14, 1992, Frey removed Long from the investigation of SCS. Long alleges that Frey then ordered him to prepare a final report of the investigation consisting of reporting one type of violation at one school. Long alleges that he prepared this report under protest. On January 22, 1992, Long was placed on administrative leave.

Long finally alleges various acts by New York officials following his placement on administrative leave and eventual termination. The essence of Long's allegations are that New York colluded with SCS's continuing fraud, thereby allowing SCS and BPSS to continue to receive federal moneys based on false claims. Long alleges that New York officials, including Frey, ignored State Comptroller reports in April and December 1992 which indicated that there was continuing and broader fraud than had been stated in the 1992 "Order to Show Cause." Long alleges that in February 1993, BPSS investigators noticed indications of continuing fraud at SCS. Long alleges that New York officials, including Frey, refused to act on that information, and instead unreasonably ordered further investigation rather than taking steps to stop the fraud. Thus, Long alleges that, between at least March 1993 and April 1994, New York and Frey knew that SCS continued to engage in fraudulent activities, but did not act upon that information. SCS declared bankruptcy in January 1995. Long alleges that between 1988 and 1991, the United States paid SCS over $25 million per year in response to SCS's false claims, with BPSS receiving a portion of these payments.

II. DISCUSSION

A complaint may be dismissed for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). The motion will be denied only if the plaintiff could prove no set of facts which would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957). In responding to a motion to dismiss, the Court treats all allegations of fact in the complaint to be true, and draws all reasonable inferences from those facts in favor of the plaintiff. *See id*; *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997); *United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F.Supp. 292, 296 (D.D.C. 1996) (*citing United Parcel Serv., Inc. v. International Bhd. of Teamsters*, 859 F. Supp. 590, 593 (D.D.C.1994)).

Federal courts are courts of limited jurisdiction. The party who invokes federal court jurisdiction must "allege in [its] pleading the facts essential to show jurisdiction," and "must support [those facts] by competent proof." *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189, 56 S.Ct. 780, 80 L.Ed. 1135 (1936).

New York has moved to dismiss the second amended complaint on the grounds of lack of subject matter jurisdiction, failure to state a claim, and failure to plead fraud with particularity as to Counts I and II. Defendant Frey has moved to dismiss the second amended complaint on the grounds of plaintiff's failure to state a claim, or, in the alternative for summary judgment on the basis of Eleventh Amendment immunity and qualified immunity.

A. Whether New York and its Officials Are Proper Defendants in an False Claims Act Suit

The first issue the Court considers in this case is New York's argument that it has Eleventh Amendment immunity from suit under the FCA. This Court rejects New York's argument that the Eleventh Amendment bars an FCA action against a state. The Eleventh Amendment is not a bar to an FCA action because the United States is always the plaintiff in a *qui tam* action and the Eleventh Amendment does not prohibit suits by the United States against States in federal court. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 71 n. 14, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996)(citing *United States v. Texas*, 143 U.S. 621, 644-45, 12 S. Ct. 488, 36 L.Ed. 285 (1892)) (noting that state compliance with federal law is ensured by the fact that the federal government can sue a state in federal court for a violation of federal law); *United States v. Mississippi*, 380 U.S. 128, 140, 85 S. Ct. 808, 13 L.Ed.2d 717 (1965) ("[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents or has ever been seriously supposed to prevent a State's being sued by the United States"). For this reason, states have often been defendants in *qui tam* suits under the FCA. *See United States ex rel. Berge v. Board of Trustees of the Univ. of Alabama*, 104 F.3d 1453 (4th Cir.) (state university defendant), *cert. denied*, —— U.S. ——, 118 S. Ct. 301, 139 L.Ed.2d 232 (1997); *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46 (4th Cir. 1992) (state university defendant); *United States ex rel. Weinberger v. Florida*, 615 F.2d 1370 (5th Cir. 1980) (state defendant); *Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055 (S.D. Ohio 1995) (state defendant); *United States ex rel.*

Milam v. Regents of Univ. of California, 912 F. Supp. 868 (D. Md. 1995) (state university defendant); *United States ex rel. Moore v. University of Mich.*, 860 F. Supp. 400 (E.D. Mich. 1994) (state defendant); *United States ex rel. Fine v. University of California*, 821 F. Supp. 1356 (N.D. Cal. 1993) (state university defendant), *aff'd*, 72 F.3d 740 (9th Cir. 1995); *United States ex rel. Navarette v. Rockwell Int'l Corp.*, 730 F. Supp. 031, 1035 (D. Colo. 1990) (laboratory, operated and managed by state university, was defendant).

In view of the foregoing persuasive authority, this Court holds that a *qui tam* action may be brought against the State of New York because a *qui tam* suit is commenced on behalf of the United States and the Eleventh Amendment does not bar suits by the federal government against a state.

B. Whether New York and Its Officials Are "Persons" Within the Meaning of the FCA

New York next argues that it is shielded from liability under the FCA because a state cannot be considered a "person" under that statute. The FCA provides, in pertinent part, that "any person" who causes false claims and reports to be presented to the United States for payment, or who forms a conspiracy to have false claims paid by the United States, will be liable for treble damages and civil penalties. *See* 31 U.S.C. § 3729. This section of the FCA, however, does not define the word "person."

The "fundamental task in interpreting the FCA is 'to give effect to the intent of Congress.'" *United States ex rel. D.J. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 681 (D.C. Cir.) (citations omitted), *cert. de-*

nied, —— U.S. ——, 118 S. Ct. 172, 139 L.Ed.2d 114 (1997). "The starting point for interpreting a statute is the language of the statute itself." *Id.* To determine the meaning of the statute, the Court considers the statute's language and structure, and its legislative history. *See California State Bd. of Optometry v. Federal Trade Comm'n*, 910 F.2d 976, 979 (D.C. Cir. 1990). Although the word "person" is ordinarily construed to exclude a sovereign, this reading "may . . . be disregarded if '[t]he purpose, the subject matter, the context, the legislative history, [or] the executive interpretation of the statute . . . indicate an intent, by the use of the term, to bring a state or nation within the scope of the law.'" *International Primate Protection League v. Administrators of Tulane Educ. Fund*, 500 U.S. 72, 83, 111 S. Ct. 1700, 114 L.Ed.2d 134 (1991) (internal quotations omitted).

Although Congress did not define the word "person" in § 3729, it did define that term in § 3733 of the FCA.[3] That section defines a "person," specifically for the purposes of that section, to include a "state." 31 U.S.C. § 3733(*l*)(4). Moreover, courts have allowed states to act as relators and bring civil suits for violations of § 3729 on behalf of the United States where the *qui tam* provisions allow a "person" to bring a civil suit. *See* 31 U.S.C. § 3730(b); *United States ex rel. Woodard v. Country View Care Center, Inc.*, 797 F.2d 888 (10th Cir.

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[3] Section 3733 of the FCA provides the federal government with a Civil Investigative Demand ("CID"). The CID enhances the federal government's investigatory powers to enable it to obtain documents or testimony relevant to a FCA investigation. 31 U.S.C. § 3733(a); S. Rep. No. 99-345, at 33, 1986 U.S. Code Cong. & Admin. News 5266. Thus, this section requires states to provide this information to the federal government. *See* 31 U.S.C. § 3733.

1986) (State of Colorado as relator); *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984) (State of Wisconsin as relator). In allowing states to act as relators, courts have thus interpreted "person" to include a state in the context of who may commence a *qui tam* action.

In the absence of express judicial authority as to whether a state may be a defendant in a *qui tam* action, however, it is necessary to consider the legislative history of the Act. The FCA was originally enacted during the Civil War to combat the rampant fraud being perpetrated on the government by defense contractors. *See* S. Rep. No. 99-345, at 8, 1986 U.S. Code Cong. & Admin. News 5266. The FCA has been amended three times, with major revisions in 1986. *See id* . The purpose of the 1986 amendments was to "make the statute a more useful tool against fraud" in the face of continuing fraud against the Government. *Id.* at 2. The Senate Report accompanying the 1986 amendments to the FCA sets out the broad reach of the statute. "In its present form . . . [t]he False Claims Act reaches all parties who may submit false claims. The term 'person' is used in its broad sense to include partnerships, associations, and corporations . . . as well as States and political subdivisions thereof." *See id.* at 8 (citations omitted).

On the other hand, New York argues that the Court should be guided by the general understanding that construing the word "person" to include states is generally disfavored. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 64, 109 S. Ct. 2304, 105 L.Ed.2d 45 (1989)(citing *Wilson v. Omaha Tribe*, 442 U.S. 653, 667, 99 S. Ct. 2529, 61 L.Ed.2d 153 (1979)).

New York's reliance upon *Will* is, however, misplaced. First, 42 U.S.C. § 1983 is clearly distinguishable from the FCA because § 1983 establishes a cause of action for *individual* plaintiffs,[4] whereas the FCA establishes civil liabilities for frauds at the expense of the United States.[5] *See* 31 U.S.C. § 3729. In an FCA action, therefore, the suit is always on behalf of the federal government. *See* 31 U.S.C. §§ 3729, 3730(b). Since § 1983 creates a private cause of action, the analysis in *Will* necessarily included Eleventh Amendment considerations. *See Will*, 491 U.S. at 66-67. The reasoning

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[4] *See id.* at 64, 1986 U.S. Code Cong. & Admin. News 5266. The full text of 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[5] New York urges, however, that in *Will*, the Supreme Court announced the "rule" that States are never "persons" in federal statutes regardless of whether the suit brought pursuant to the statute would be brought by an individual plaintiff or by the United States, relying upon a case from this circuit. *California State Bd. of Optometry v. Federal Trade Comm'n*, 910 F.2d 976 (D.C. Cir. 1990). In *California State Board*, the question facing the D.C. Circuit was whether a state, acting in its sovereign capacity, is subject to regulation by the FTC under the Magnuson-Moss Amendments to the Federal Trade Commission Act, which granted the FTC rulemake authority to define specific acts or practices as unfair. *Id.* at 978-79. In addition to New York's overbroad reading of the holding in *Will*, its reliance on *California State Board*, a case construing an agency's power, in that case, the FTC, to regulate states under a statute enacted by Congress, pursuant to its Commerce Clause power, is misplaced.

underlying the *Will* Court's reluctance to construe "persons" to include States for the purposes of § 1983 was "that if Congress intend[ed] to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute.'" *Will*, 491 U.S. at 65 (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S. Ct. 3142, 87 L.Ed.2d 171 (1985)). Because states are not immune from suits by the federal government, however, Congress was not required to state in the FCA that it intended to abrogate the states' sovereign immunity, as Congress would have been required to do if it intended to subject states to private suits by individuals.

After reviewing the language and purpose of the statute, this Court finds no indication that Congress sought to create an exception for state actors to perpetrate fraud upon the federal government, especially since states are not immune to suits by the federal government in federal court. *See United States v. Rockwell Int'l Corp.*, 730 F. Supp. 1031, 1035 (D. Colo. 1990) (holding that state defendants are not entitled to Eleventh Amendment immunity from suits brought pursuant to the FCA and noting that to "hold otherwise would render meaningless the FCA's provision authorizing *qui tam* actions against state agencies and officials operating under government contracts"). Consistent with the intent and purpose of the FCA, the Court therefore concludes that states are "persons" for the purposes of § 3729 and that Congress did not intend to exempt states from the FCA.

C. Whether the FCA's Damages Provisions Are Punitive and Therefore Inapplicable to a State

As a final point, New York argues that the damages provision of the FCA suggests that the statute has a punitive purpose, and consequently, that the FCA cannot apply to the states because states enjoy a common law immunity to punitive damages which can only be overcome by a clear congressional statement of abrogation.

The purpose of the FCA is to enable the federal government to recover losses it sustains as a result of fraud. *See* S. Rep. No. 99-345, at 2-8, 1986 U.S. Code Cong. & Admin. News 5266. In interpreting the pre-1986 version of the FCA, which provided for double damages and penalties, the Supreme Court held that the FCA was a remedial, rather than punitive statute. *See United States v. Halper*, 490 U.S. 435, 446, 449, 109 S. Ct. 1892, 104 L.Ed.2d 487 (1989) (the FCA's damages provision represents "rough remedial justice" as long as rational relation exists between the government's loss and the damages imposed); *United States v. Bornstein*, 423 U.S. 303, 314-315, 96 S. Ct. 523, 46 L.Ed.2d 514 (1976) (FCA's damages provision are remedial except under extreme circumstances); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 551-52, 63 S. Ct. 379, 87 L.Ed. 443 (1943) (purpose of the FCA is to make the government whole for its losses and therefore statute not punitive). The Court further reasoned that the federal government is entitled to "rough remedial justice" and declined to impose a more exact method of accounting on the Congress. *United States v. Bornstein*, 423 U.S. at 314-315.

With regard to the treble damages provision of the amended FCA, the Eighth Circuit has held that the amended provision does not transform the statute from a remedial to a punitive one. In *United States v. Brekke*, 97 F.3d 1043 (8th Cir. 1996), the court held that the FCA's treble damages were compensatory rather than punitive. *Id.* at 1047. The court based its decision upon the Supreme Court's reasoning in *Halper* that the "'Government is entitled to rough remedial justice, that is, it may demand compensation according to a somewhat imprecise formula.'" *Brekke*, 97 F.3d at 1047 (quoting *Halper*, 490 U.S. at 446). This Court agrees with the reasoning in *Brekke* and concludes that the federal government's recovery of treble damages gives it "rough remedial justice" and therefore that the FCA is a remedial statute.

Furthermore, there is no indication that Congress intended to change the purpose of the statute from a remedial to a punitive one when it enacted the 1986 Amendments. *See* S. Rep. No. 99-345, at 7, 1986 U.S. Code Cong. & Admin. News 5266 (noting that the Committee clarified that knowing standard did not require actual knowledge of fraud or specific intent to commit the fraud in order to make it more appropriate for *remedial* actions) (emphasis added).

Rather, the damages provision was amended for other reasons. First, Congress saw the need to modernize the provision, which had not been changed since the FCA was originally enacted 123 years ago. *See id.* at 2. Second, the provision was changed to make it consistent with the false claims provision in the 1986 Department of Defense Appropriations Act. *See id.* at 17. Third, the increased damages provision gives effect

to the overall purpose of the 1986 amendments to make the FCA more effective and to encourage *qui tam* actions. *See id.* at 2. Although the amended FCA does not provide for a significant increase in the percentage of the recovery to a *qui tam* relator,[6] by virtue of the increased damages, the relator stands to receive a larger recovery. This increased recovery therefore serves the purpose of encouraging *qui tam* actions.

The Court therefore concludes that the FCA's penalties are not punitive, but rather remedial, as long as a rational relation exists between the government's loss and the damages assessed.

Given the Court's conclusions that New York may be sued under the FCA, that New York may be considered a "person" within the context of the FCA, and that the damages provisions of the FCA are not punitive, the Court goes on to consider the subject matter jurisdiction provisions of the FCA.

D. Whether this Court Has Subject Matter Jurisdiction Under the FCA

Long brings his action under the FCA against New York and against his supervisor, Joseph P. Frey. New York, in its motion to dismiss, argues that the FCA

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[6] Under the former FCA, when the government intervened, the relator would receive 10% of the recovery; and when the government did not intervene, the relator would receive 25% of the recovery. *See* S. Rep. No. 99-345, at 27, 1986 U.S. Code Cong. & Admin. News 5266. Under present law, when the government intervenes, the relator receives between 10% and 20% of the recovery; and when the government does not intervene, the relator receives between 20% and 30% of the recovery. 31 U.S.C. § 3730(d)(1), (2).

precludes this Court from asserting subject matter jurisdiction over this action. The Court must look to the language of the statute itself to assess the merits of defendant's contention. *Consumer Product Safety Comm'n v. GTE Sylvania Inc.*, 447 U.S. 102, 100 S. Ct. 2051, 64 L.Ed.2d 766 (1980).

The FCA sets out a two-part test to determine whether a court has subject matter jurisdiction over plaintiff's *qui tam* action and prohibits

> private plaintiff suits based upon the *public disclosure* of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, *unless* the action is brought by the Attorney General or the person bringing the action is an *original source* of the information.

31 U.S.C. § 3730(e)(4)(A) (emphasis added). The statute defines an "original source" as

> an individual who has *direct and independent knowledge* of the information on which the allegations are based and has *voluntarily provided* the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4)(B) (emphasis added).

Thus, the Court must first determine if the allegations raised in this suit were publicly disclosed under the meaning of the statute. If the allegations were publicly disclosed, the Court may only assert subject

matter jurisdiction over this *qui tam* action if plaintiff was an original source of the information.

1. Public Disclosure Inquiry

Although both Long and New York agree that the allegations of fraud against SCS were publicly disclosed under the FCA as part of New York's 1992 administrative proceedings against SCS, the parties disagree as to whether New York's alleged fraud was publicly disclosed.

New York argues that because the allegations against SCS and New York are inextricably linked, Long can not "parse out" each claim and treat the allegations separately for purposes of determining whether public disclosure has occurred. In support of its position, New York cites a Tenth Circuit case which held that when a "*qui tam* action is based in any part upon publicly disclosed allegations or transactions," the court must then proceed to the "original source" inquiry. *See United States ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548 (10th Cir. 1992).

Long first asserts that even though the allegations against SCS were publicly disclosed, the allegations against New York and Frey were not publicly disclosed, and therefore Long is not jurisdictionally barred from raising this claim. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 657 (D.C. Cir. 1994) (holding public disclosure under § 3730(e)(4)(A) occurs "only when specific allegations of fraud or the vital ingredients to a fraudulent transaction exist in the public eye") Here, only two of the many components of the alleged conspiracy by New York were publicly disclosed: that the SCS had acted

fraudulently and that New York had settled with SCS. These two details, however, do not constitute the "vital ingredients" of the allegations against New York. Further, this circuit stated that "Congress sought to limit *qui tam* actions 'to those in which the relator has contributed significant independent information [that is not already in the public domain].'" *United States ex rel. D.J. Findley v. FPC Boron Employees' Club*, 105 F.3d 675, 682 (D.C. Cir. 1977) (citing *Quinn*, 14 F.3d at 653). In his claim, Long demonstrates that he has knowledge of substantive information concerning the allegations of fraud against New York and Frey, separate from what has already been disclosed concerning SCS. In reviewing Long's allegations, the Court concludes that the allegations against New York and Frey are separate and distinct from those against SCS.

New York next argues that even if the allegations against SCS are found to be separate from those against New York, Long's disclosures to federal authorities and to the United States Department of Education ("DOE") constitute a public disclosure because they took place within the course of his administrative investigation. *See United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1004 (10th Cir. 1996) (holding relator publicly disclosed when he provided information regarding contractor fraud to his to age discrimination representative); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992) (holding public disclosure occurred when fraud disclosed to defendant's employees during investigation).

Long asserts that disclosure to federal authorities and to the DOE is not within the statute's meaning of

"public disclosure." Specifically, Long argues that disclosure of the results of the investigation conducted by three year a *state* administrative agency to federal authorities does not fit within the meaning of the "public disclosure" provision of the FCA.

Allegations of fraud are publicly disclosed "when they are placed in the public domain." *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990). In this case, the results of Long's administrative investigation were disclosed to federal authorities. Courts have recognized that this is sufficient to place the government on the trail of the alleged wrongdoing:

> In deciding whether the information conveyed to the court is "based upon a publicly disclosed allegation or transaction," the question is whether the information in the public domain "... could at least have alerted law enforcement authorities to the likelihood of wrongdoing . . ."

United States ex rel. Alexander v. Dyncorp, Inc., 924 F. Supp. 292, 299 (D.D.C. 1996) (quoting *Quinn*, 14 F.3d at 654). Here, because Long alerted federal authorities, making them aware of the purported fraudulent conduct, the allegations became "publicly disclosed" within the meaning of the FCA. This leads the Court to the "original source" inquiry.

2. Original Source Inquiry

It is well established that the purpose of the 1986 amendments to the FCA was to allow a relator's claim where disclosure to federal authorities has taken place, but where the relator is an original source. *Hughes*

Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 117 S. Ct. 1871, 138 L.Ed.2d 135 (1997). Under § 3730(e)(4)(B), Long must demonstrate that he has "direct and independent knowledge" of the information on which the allegations are based, and that he "voluntarily provided [such] information" to the government prior to filing suit. *See also United States ex rel. D.J. Findley v. FPC-Boron Employees' Club*, 105 F.3d at 690 ("To qualify as an 'original source,' the relator must also have 'voluntarily provided the information to the government' before filing a *qui tam* suit which is 'based on the information.'").

First, New York argues that Long did not have "direct" knowledge because as coordinator of the investigation, Long received his information from other people. "Direct" signifies "marked by absence of an intervening agency." *Quinn*, 14 F.3d at 656. New York further argues that Long did not have independent knowledge because it was his job to obtain this information. *Quinn* elucidates that the original source provision requires the "relator to possess direct and independent knowledge of the 'information' supporting any essential element of the underlying fraud transaction," but "does not require that the *qui tam* relator possess direct and independent knowledge of all of the vital ingredients to a fraudulent *transaction*." *Quinn*, 14 F.3d at 657. Long more than satisfies the "direct knowledge" aspect of the FCA provision because, through his own labor, he gained first hand knowledge of defendant's fraudulent conduct. *See Cooper ex rel. United States v. Blue Cross & Blue Shield of Fla., Inc.*, 19 F.3d 562, 568 (11th Cir. 1994) (per curiam) (finding "direct knowledge" when relator acquired information

through three years of his own research prior to public disclosure).

Moreover, Long's knowledge of the allegations is "independent" because it is "knowledge that is not itself dependant on public disclosure to federal authorities." *See Quinn*, 14 F.3d at 656. In fact, the reverse occurred in that Long was the one to notify the federal authorities. To find that Long is barred from bringing this *qui tam* action would undermine the purpose behind the 1986 amendments: to discourage "parasitic suits" while encouraging parties to reveal fraudulent conduct to the government.

Finally, New York argues that Long does not satisfy the "voluntarily provided" element of § 3730(e)(4)(B) because reporting such information to his employer and the federal government was his job. The Court finds this argument without merit because Long was employed by a state agency and therefore, Long had no duty to report the results of his investigation to federal authorities.

The Court concludes that Long is an "original source" of the allegations against New York and Frey within the meaning of the FCA. Thus, this Court properly invokes subject matter jurisdiction over this action under § 3730(e)(4) of the FCA because, even though there was public disclosure, Long meets the statutory requirement for an original source.

E. Whether Long has Pled Fraud with Particularity as to Count I

A failure to plead fraud with particularity is a ground for dismissal for failure to state a claim upon which

relief can be granted. Fed. R. Civ. P. 9(b); *see United States ex rel. Alexander v. Dyncorp, Inc.*, 924 F. Supp. 292, 302 (D.D.C. 1996) (citing *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 520 (5th Cir. 1993)).

Count I of the complaint alleges that New York and defendant Frey engaged in a conspiracy in violation of 31 U.S.C. § 3729(a)(3). In support of this allegation, Long alleges that New York officials agreed among themselves and with SCS to conceal and protect pervasive fraud in which the New York officials knew SCS was engaging, thereby allowing the fraud to continue. New York argues that Long has not pled the fraud he has alleged against them with particularity because he has not specified the material elements of the conspiracy, and because he has not "demonstrated" that the New York officials and SCS reached an agreement in order to get a false claim paid.

Section 3729(a)(3) of the FCA makes liable any person who "conspires to defraud the Government by getting a false or fraudulent claim allowed or paid." Under this section, the relator must show:

(1) that defendant conspired with one or more persons to have a fraudulent claim paid by the United States,

(2) that one or more of the conspirators performed any act to have such a claim paid by the United States, and

(3) that the United States suffered damages as a result of the claim.

United States v. Bouchey, 860 F.Supp. 890, 893 (D.D.C. 1994) (citing cases). Since the first criterion of § 3729(a)(3) involves an allegation of fraud, under Rule 9(b) of the Federal Rules of Civil Procedure, "the circumstances constituting fraud [must] . . . be stated with particularity." *See Quinn*, 14 F.3d at 655 n. 10. This requires that the Long describe the fraudulent conduct rather than merely make conclusory allegations of fraud. *See United States ex rel. Stinson v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247, 1258 (S.D. Fla. 1989) (citing *Lincoln Nat'l Bank v. Lampe*, 414 F.Supp. 1270, 1278-79 (N.D. Ill. 1976)). To survive a motion to dismiss, the complaint must contain the folowing particulars: the time, place and content of the false misrepresentations, the fact misrepresented, what was given up or retained as a result of the fraud, and the individual who made the misrepresentation. *See Bouchey*, 860 F. Supp. at 893. However, an exception to these requirements exists when this information is exclusively within the knowledge and control of the moving party. *See Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055, 1061 (S.D. Ohio 1995). Long is, however, only required to allege this information, not "demonstrate" it, as defendants contend. *See Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 828 (S.D.N.Y. 1986).

To satisfy the first criterion of § 3729(a)(3), that defendant conspired to have a false claim paid, Long alleges that New York officials conspired with SCS "to conceal and to protect" the pervasive fraud of the SCS defendants in order to have the United States pay false claims. Long does not, as New York contends, however, stop here. Rather, in support of this allegation, Long alleges that the conspiracy occurred at least between

October 1990 and January 1995; that it occurred in New York; that the fraud consisted of New York officials not preventing SCS from presenting what the New York officials knew were false claims for federal educational assistance consisting of recruiting and accepting ineligible students, placing students in ineligible courses and classes, falsifying attendance and other records, and withholding refunds due to students; that New York received a portion of the federal funding; and that New York officials were able to maintain and potentially advance their positions with the state as a result of the conspiracy. Finally, the complaint names a number of New York officials who were part of the alleged conspiracy, including Joseph P. Frey, who was Long's supervisor. Presuming the truth of these allegations pursuant to the Rule 12(b)(6) standard, as the Court must at this juncture, *see id.*; *EEOC v. St. Francis Xavier Parochial School*, 117 F.3d 621, 624 (D.C. Cir. 1997), Long has satisfied the first criterion consistent with the Rule 9(b) standard.

The second criterion of § 3729(a)(3) requires that Long show that any one of the conspirators performed an act to have a false claim paid. In his complaint, Long asserts, *inter alia*, that New York officials rejected and ignored evidence that Long had uncovered in his investigation that the SCS defendants were engaged in those fraudulent activities, and that the New York officials limited Long's investigation in order to allow the SCS officials to continue to present false claims. Thus, Long has alleged that the overt acts which the New York officials performed were, *inter alia*, allowing the alleged fraud to continue in the face of evidence uncovered by Long's investigation and limiting Long's investigation in numerous ways in order to allow the

fraud to continue. Presuming the truth of these allegations pursuant to the Rule 12(b)(6) standard, Long has satisfied the second criterion consistent with the Rule 9(b) standard.

The final criterion of § 3729(a)(3) requires that the United States suffer damages as a result of the false claim. Long asserts that the United States lost $25 million per year as a result of these false claims. Presuming the truth of these allegations pursuant to the Rule 12(b)(6) standard, Long has satisfied the third criterion consistent with the Rule 9(b) standard.

Accordingly, New York's motion to dismiss this count for failure to plead fraud with particularity with respect to Count I is therefore **DENIED.**

F. Whether Long Has Stated a Claim under § 3729(a)(1) & (2)

Count II of the complaint alleges that New York knowingly caused false and fraudulent claims based upon false records to be presented to the federal government in violation of 31 U.S.C. § 3729(a)(1) and (2), and that New York was unjustly enriched thereby. Long alleges that New York officials caused the presentation of false claims and the making and using of false records and statements to achieve the payment or approval of a false or fraudulent claim, by, in essence, failing to prevent SCS from filing false claims even after New York officials knew that SCS was engaging in presenting false claims. New York argues that Long has failed to state a claim for relief under §§ 3729(a)(1) and (a)(2) because New York had no affirmative duty to prevent false claims from being presented.

The FCA establishes the liability of any person who knowingly causes false or fraudulent claims and/or records to be presented to the federal government for payment. § 3729(a)(1) and (2); *see Bouchey*, 860 F. Supp. at 893. According to the Senate Report, this knowing standard does not require either actual knowledge of the fraud or specific intent to commit the fraud. *See* S. Rep. No. 99-345, at 7, 1986 U.S. Code Cong. & Admin. News 5266. Therefore, in order to survive a motion to dismiss for failure to state a claim, the relator must only show (1) that there was a request for payment, and (2) that it was a fraudulent request. *See id.* Since the second criterion is an allegation of fraud, it is subject to the same particularity requirements outlined above. *See* Fed. R. Civ. P. 9(b).

At issue here is what is intended under the FCA to "cause" a false claim to be presented. The FCA reaches anyone who knowingly participates in causing the federal government to pay a false claim. *See United States ex rel. Marcus v. Hess*, 317 U.S. at 544-45; S. Rep. 99-345, at 9, 1986 U.S. Code Cong. & Admin. News 5266 ("The False Claims Act is intended to reach all fraudulent attempts to cause the Government to pay out sums of money. . . ."). Thus, for example, the FCA reaches subcontractors who cause general contractors to present false claims. *See United States v. Bornstein*, 423 U.S. at 309. The FCA has been held to reach conduct which results in a loss to the government, even though the defendant did not "make an actual demand for the money." *United States v. McLeod*, 721 F.2d 282, 284 (9th Cir. 1983) (holding that a defendant who converted and refused to return money, resulting in a financial loss to the government, was sufficient to invoke the FCA). The FCA has also been held to reach

the operating policy of a defendant which caused others to present false claims to the government. *United States v. Teeven*, 862 F. Supp. 1200, 1223 (D. Del. 1992) (holding that defendants, whose policy to withhold refunds due to students resulted in inflated default claims to the government, were liable under the FCA because the "[d]efendants knowingly assisted in causing the Government to pay claims which were grounded in fraud."). Thus, in broad terms, the FCA reaches all parties who "engage[] in a fraudulent course of conduct that causes the government to pay a claim for money." *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 439 (E.D. N.Y. 1995).

The question here is whether New York knowingly "caused" false claims to be presented when it allegedly did not prevent the claims from being presented. First, New York contends that Long has not alleged that New York was under a duty to revoke SCS's licenses once it became aware of the fraudulent conduct, and in support, it cites the relevant New York state code regarding the administrative procedure the NYSED was required to follow before taking disciplinary action against SCS. Second, New York argues Long has not alleged that New York had a legal obligation to the United States Government to disclose the alleged fraud being perpetrated by the SCS defendants.

The Court finds both of New York's arguments unpersuasive. First, the issue is not whether the New York defendants violated the FCA by not closing down the SCS schools once New York learned of the alleged fraud. The issue here is whether New York's alleged failure to act was a course of conduct that allowed fraudulent claims to be presented to the federal

government. Long has alleged, with the requisite specificity, that New York officials allowed false claims to be presented to the federal government over a number of years, and even after it knew that false claims were being made.

Finally, New York argues that in order for it to be liable under the FCA, Long must allege with the requisite particularity that the New York defendants had the *same* knowledge as SCS regarding the falsity of each claim. This is a misreading of the FCA as applied to this situation. Here, Long must allege with the requisite specificity that New York allowed what it knew to be false claims to be presented to the United States. Long has alleged that as a result of the findings of his investigations, New York knew that SCS was presenting false claims and that it did not stop SCS from doing so. Thus, New York does not have to be in the same position as SCS. The FCA prohibits *both* presenting false claims and causing false claims to be presented. *See* 31 U.S.C. § 3729(a)(1), (2). Long has not contended that New York presented the false claims itself, rather his contention is that New York caused the false claims to be presented. At this stage of the proceedings, the Court finds that Long has alleged the fraud prohibited by § 3729(a)(1) and (2) with sufficient particularity to clear the Rule 9(b) hurdle.

Accordingly, New York's motion to dismiss Count II for failure to state a claim upon which relief can be granted is **DENIED.**

G. Long's Unjust Enrichment Claim on Behalf of the United States

Count II also seeks to invoke the equitable powers of the Court and charges that New York was unjustly enriched by its share of the payments that the federal government made to the SCS defendants. New York argues that Long does not have standing to pursue this common law claim because it is a claim that is personal to the United States and therefore the *qui tam* relator has not suffered an injury in fact.

The relator has standing to bring the FCA claim "either because of his financial stake in the outcome or because Congress statutorily assigned him part of the Government's cause of action." *United States ex rel. Mayman v. Martin Marietta Corp.*, 894 F. Supp. 218, 225 (D. Md. 1995) (citing Thomas R. Lee, Comment, *The Standing of Qui Tam Relators Under the False Claims Act*, 57 U. Chi. L. Rev. 543, 555-570 (1990)). An unjust enrichment claim, however, is a common-law cause of action separate and distinct from the FCA claim. In order to bring an unjust enrichment claim, the Long must show (1) that he conferred a benefit upon the defendant; (2) that the defendant knew he was receiving this benefit; and that (3) it would be inequitable for the defendant to retain the benefit. *See Bouchey*, 860 F. Supp. at 894. Because it is the United States, and not the relator, who conferred the benefit at issue in this case (i.e. federal funding), and at whose expense it would be inequitable for the defendant to retain the benefit, Long does not have standing to bring this

unjust enrichment.[7] Therefore, New York's motion to dismiss Long's unjust enrichment claim is **GRANTED.**

H. Long's Count III Claim of Wrongful Discharge Against New York and Defendant Frey

1. Whether Long's Claim Against New York Is Barred by the Eleventh Amendment

Count III of Long's second amended complaint alleges that New York and Frey harassed and discharged him in violation of 31 U.S.C. § 3730(h). Section 3730(h) contains the "whistleblower" protection provisions of the FCA and provides that any employee whose employment is adversely affected as a result of actions taken to further a *qui tam* action is "entitled to all relief necessary to make the employee whole" and grants district courts jurisdiction over such actions. 31 U.S.C. § 3730(h). The question here is whether, as New York argues, the Eleventh Amendment prohibits the application of § 3730(h) to a state defendant because Congress has not unequivocally abrogated state sovereign immunity, or, as Long argues, whether § 3730(h) is an integral component of the *qui tam* provisions and therefore, that a suit against a state is not barred by the Eleventh Amendment because it is brought on behalf of the United States.

Sections 3730(a)-(h) contain the FCA's qui tam provisions. Section 3730(b) establishes the *qui tam* cause of action providing that an action for a violation of § 3729 shall be brought "for the person and for the

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[7] Since the Court has decided this issue on the grounds of standing, the Court does not reach New York's Eleventh Amendment argument.

United States Government . . . in the name of the Government." § 3730(b). Section 3730(h), the final subsection in the *qui tam* section, contains the whistleblower protection provisions, which state that "[a]n *employee* may bring an action in the appropriate district court of the United States for the relief provided in this subsection." § 3730(h) (emphasis added). Thus, § 3730(h) differs from § 3730(b) in that, although § 3730(h) is part of the *qui tam* provisions, it does not provide that an action brought pursuant to this section is brought in the name of the United States. The whistleblower provision is therefore properly understood as authorizing a private right of action distinct from the *qui tam* action authorized by § 3730(b).

Under the Eleventh Amendment, a suit by an *individual* against a state, in federal court, proceeds only if "Congress clearly intended to abrogate the States' sovereign immunity . . . [and if] the Act [in which the immunity is abrogated] was passed 'pursuant to a valid exercise of power.'" *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 58, 116 S. Ct. 1114, 134 L.Ed.2d 252 (1996) (quoting *Green v. Mansour*, 474 U.S. 64, 68, 106 S. Ct. 423, 88 L.Ed.2d 371 (1985)). If Congress intends to abrogate a state's immunity, Congress' abrogation must be expressed in a "clear legislative statement" in the statute. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 786, 111 S. Ct. 2578, 115 L.Ed.2d 686 (1991); *see also Dellmuth v. Muth*, 491 U.S. 223, 227-228, 109 S. Ct. 2397, 105 L.Ed.2d 181 (1989). Under the clear statement standard, then, a statement in the legislative history of a statute, but not in the statute itself, fails to be a clear statement of congressional intent to abrogate.

Section § 3730(h) authorizes any employee to bring an action against his or her employer. At issue is whether in using the word "employer" Congress has abrogated state sovereign immunity. This section of the FCA does not define "employer." However, in the Senate Report accompanying the bill, Congress elaborated upon what it meant by "employer." The report states that, as with the whistleblower protection provisions in other federal statutes after which this provision was patterned, "the definition[] of . . . 'employer' should be all inclusive . . . includ[ing] public as well as private sector entities." *See* S. Rep. No. 99-345, at 35, 1986 U.S. Code Cong. & Admin. News 5266. Under the clear statement standard, however, the Court must find that Congress' intent to protect whistleblowers does not extend to whistleblowers whose employer is a state because Congress did not clearly state such intention in the statute, even if the legislative history suggests such an intention.

District courts construing § 3730(h) similarly have held that actions brought against states pursuant to this section are barred by the Eleventh Amendment because the language in § 3730(h) does not unequivocally state a congressional intent to abrogate the states' immunity to suit. *Accord United States ex rel. Moore v. University of Mich.*, 860 F. Supp. at 404-05 (dismissing relator's § 3730(h) claim against a state entity on Eleventh Amendment grounds because, even though it is part of the *qui tam* provisions, § 3730(h) creates a private cause of action and does not specifically provide that the United States be a party to the action); *see also Wilkins ex rel. United States v. Ohio*, 885 F. Supp. 1055, 1067 (S.D. Ohio 1995) (citing *Thiokol Corp. v. Department of Treasury*, 987 F.2d 376 (6th Cir. 1993) (holding

that Eleventh Amendment barred an action under § 3730(h) for compensatory relief, but not for prospective injunctive relief against officials in their official capacities)).

To sidestep the Eleventh Amendment bar, Long argues that an action under § 3730(h) should be considered an action on behalf of the United States because the whistleblower provision encourages individuals to come forward with information about fraud committed against the United States. *See United States ex rel. Foulds v. Texas Tech Univ.*, 980 F. Supp. 864, 871 (N.D. Tex. 1997) (allowing suit against state entity under § 3730(h) based on the conclusion that the United States would suffer the greatest harm if § 3730(h) did not protect state employees because whistleblowers would not be encouraged to come forward for fear of retaliation). While as a practical matter, Long's argument may be correct that without the protection of § 3730(h), state employees will be reluctant to come forward for fear of retaliation, under this Court's interpretation of the statute, an action under § 3730(h) is a private cause of action, and not an action on behalf of the United States. Under the clear statement rule, therefore, Congress must clearly state in the statute that it intends to extend liability under § 3730(h) to states.

While a state employee may be reluctant to come forward with information without the protection § 3730(h) provides, the financial incentives of bringing a *qui tam* action remain. Therefore, the Court cannot conclude that the purpose of the statute would be frustrated by failure to apply § 3730(h) to a state employer. The Court thus holds that an action for

monetary relief under § 3730(h) may not be brought against a state because of its Eleventh Amendment immunity from suits by individuals. Because this Court finds that Congress did not abrogate state sovereign immunity in § 3730(h), New York's motion to dismiss Count III is **GRANTED.**

2. Whether Long's Count III Claim of Wrongful Discharge Against Defendant Frey Is Barred by the Eleventh Amendment

Although the Eleventh Amendment bars suits by an individual against a state employer under § 3730(h) for monetary relief, the Eleventh Amendment does not prevent a suit under *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908), against a state official, in his official capacity, where the remedy sought is prospective injunctive relief against the state official to "'end a continuing violation of federal law.'" *Seminole*, 517 U.S. at 73 (internal citation omitted). *Seminole* instructs, however, that an *Ex Parte Young* action is not generally available "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole*, 517 U.S. at 73. In the FCA, Congress' remedial scheme consists simply of creating a cause of action for qualified whistleblowers and granting district courts jurisdiction to adjudicate those causes of action. Creating a cause of action cannot be considered a "detailed remedial scheme" and therefore, an *Ex Parte Young* action should be allowed where a state is the defendant-employer in a claim under § 3730(h).

Defendant Frey's argument for dismissal is that New York, and not Frey is Long's "employer" and therefore, that Frey cannot be liable under § 3730(h). In his

official capacity, however, Frey represents New York, and as such, can be considered Long's employer under § 3730(h). The Court therefore holds that Long may maintain his claim under § 3730(h) for prospective injunctive relief against Frey. Defendant Frey's motion to dismiss Long's § 3730(h) claim in Count III therefore is **GRANTED** insofar as Long seeks monetary relief, but **DENIED** insofar as Long seeks prospective injunctive relief.

3. Whether Long's § 3730(h) Claim Against Defendant Frey Fails to State a Claim Upon Which Relief Can Be Granted

As this Court has held that Long's § 3730(h) claim may proceed against defendant Frey for prospective injunctive relief, the question remains whether Long has stated a claim upon which relief can be granted.

Under § 3730(h), any employee whose employment is adversely affected "because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section" is "entitled to all relief necessary to make the employee whole." § 3730(h). The statute indicates that the acts that are protected "include[] investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section." *Id.* In order to state a claim under this section, the relator must show (1) he took actions that are protected by the statute, (2) the defendants knew that he took these actions, and (3) he was fired in retaliation for those actions. *See Robertson v. Bell Helicopter Textron Inc.*, 32 F.3d 948, 951 (5th Cir. 1994). Pursuant to a Rule 12(b)(6) motion, the Court need only satisfy itself that assuming that the

relator's allegations are true, he has sufficiently alleged these elements.

New York[8] argues that Long has not stated a claim under § 3730(h) because it was Long's job to investigate possible false claims against the federal government, and therefore, he was not "acting for himself or others in furtherance of a FCA action," as required by the statute.

The Senate Report accompanying the enacted version of the bill instructs courts to broadly interpret which activities are protected. *See* S. Rep. No. 99-345, at 34, 1986 U.S. Code Cong. & Admin. News 5266. Long alleges that the protected actions he took in furtherance of this action were his refusal to limit his investigation as his supervisors instructed him and reporting the results of his investigation to federal authorities. Drawing all reasonable inferences in favor of Long, by not limiting his investigation, and by reporting both the results of his investigation and New York's interest in the federal funds disbursed to SCS, this Court can reasonably conclude that Long discovered fraud which was in furtherance of his *qui tam* action.

The second element under § 3730(h) the relator must show is that the defendant know that the relator was engaged in protected activities. *See also* S. Rep. No.

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[8] Both New York and Frey argue that Long fails to state a claim under § 3730(h). Although the Court holds that New York is not a proper defendant for a claim under § 3730(h), the Court considers New York's arguments as Defendant Frey's. Furthermore, in his own motion, Defendant Frey has adopted New York's arguments. *See* Frey Mem. P & A at 1.

99-345, at 35, 1986 U.S. Code Cong. & Admin. News 5266 ("the whistleblower must show the employer had knowledge the employee was engaged in 'protected activity'"). Frey argues that Long has not stated a claim under § 3730(h) because Long has not alleged that his supervisors had noticed that he was pursing a FCA action against them.

In *Robertson*, the Fifth Circuit interpreted the knowledge requirement to mean that the employee must actually accuse his employer of defrauding the government. *See Robertson*, 32 F.3d at 951. The *Robertson* court made this determination in the context of an employee whose job was to substantiate costs his employer was charging the government, and so reasoned that since this was his job, merely questioning his supervisors about costs did not satisfy the statute. *See id.* at 951-52.

Other courts have not required an express accusation, but rather have analyzed whether the actions that Long allegedly took could reasonably have "put defendants on notice of a possible *qui tam* action." *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1522 (10th Cir. 1996). In *Ramseyer*, the court found that Long had not satisfied this requirement where the plaintiff's job was to monitor compliance with Medicaid requirements and she complained to her supervisors that the company was not complying with these requirements. *See id.* at 1522-23. The court found, however, that on the facts of that case, the "[p]laintiff gave no suggestion that she was going to report such noncompliance to government officials." *See id.* at 1523.

In another case, *Mikes v. Strauss*, 889 F. Supp. 746 (S.D. N.Y. 1995), the court reasoned that "insist[ing] upon an express or even an implied threat of [a *qui tam*] action . . . is wholly unrealistic in an employment context." *Id.* at 753. In *Mikes*, the court held that the notice rule required that the employee show that the "employer [had] reason to believe that the employee was contemplating a *qui tam* action against it." *Id.* The *Mikes* court allowed a § 3730(h) action to proceed where, although the employee did not make any specific accusations of fraud against her employer, her complaints to her supervisor "clearly impl[ied] that defendant's activities were unlawful." *Id.*

In the present case, Long alleges that he disregarded Frey's, his supervisor's, instructions to limit his investigation, that Frey knew that his instructions were being disregarded, and that, although Frey apparently eventually acquiesced, Frey resisted Long's recommendation that federal authorities be notified of the information developed in the course of the investigation. Long further alleges that federal authorities suggested that Long seize SCS documents that were in danger of being destroyed, that he reported his cooperation with the federal authorities to Frey, and that Frey objected to Long's seizure of the documents and directed him to return them to SCS. Thus, unlike the facts in *Robertson* and *Ramseyer*, Long's supervisors allegedly knew that he was cooperating with federal officials. Soon thereafter, Long was removed from supervision of the investigation, demoted, and eventually fired. Taking these factual allegations as true for the purposes of a motion to dismiss, this Court finds that the facts as alleged gave New York and Frey reason to

believe that Long would pursue a FCA claim against them.

The third element under § 3730(h) requires that the employee show that he was fired in retaliation for engaging in protected activities. *See also* S. Rep. No. 99-345, at 35, 1986 U.S. Code Cong. & Admin. News 5266 ("the whistleblower must show . . . the retaliation was motivated, at least in part, by the employee's engaging in protected activity"). The employee is required to establish this by a preponderance of the evidence. *See* S. Rep. No. 99-345, at 35, 1986 U.S. Code Cong. & Admin. News 5266. Once this has been satisfied, the burden then shifts to the employer "to prove affirmatively that the same decision would have been made even if the employee had not engaged in protected activity." *Id.*

In the present case, Long alleges that he was removed from his position following his assisting federal authorities to obtain, by means of a subpoena *duces tecum*, information in the files of his employer, which his employer allegedly intended to return to SCS, and which federal authorities felt they needed for their investigation of SCS. This, together with the other allegations outlined above, taken as true for the purposes of this Rule 12(b)(6) motion together with all reasonable inferences from them, satisfy Long's burden at this stage of the proceedings of showing that he was terminated in retaliation for protected activities.

As this Court finds that Long has stated a claim upon which relief can be granted under § 3730(h), Frey's motion to dismiss this claim under Count III is **DENIED.**

I. Whether Defendant Frey is Entitled to Summary Judgment on Long's § 1983 Claim

The Court may grant a motion for summary judgment only where there is no "genuine issue as to any material fact and viewing the evidence in the light most favorable to the nonmoving party, the movant is entitled to prevail as a matter of law." Fed. R. Civ. P. 56(c); *Diamond v. Atwood*, 43 F.3d 1538, 1540 (D.C. Cir. 1995).

Long filed his original complaint, under seal, in September 1992. Long later filed an amended complaint on March 15, 1995, in which he named Frey as a defendant.[9] Defendant Frey argues that Long's claim against him under § 1983 is barred by the three year statute of limitations that applies to Long's claim.

The statute of limitations applicable to a § 1983 action is the state statute of limitations for personal injury actions, which in this case, is three years both for New York, *see Rodriguez v. Chandler*, 641 F. Supp. 1292 (S.D. N.Y. 1986), and for the District of Columbia. *See Banks v. Chesapeake & Potomac Tel. Co.*, 802 F.2d 1416 (D.C. Cir. 1986); *Greenfield v. District of Columbia*, 623 F. Supp. 47 (D.D.C. 1985) (citing D.C. Code § 12-301(8)). Furthermore, a civil rights claim begins to accrue when the aggrieved party knows or has reason to know of the injury which is the basis for the § 1983 action. *See Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975) ("Federal law holds that the time of

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[9] Although Long's original complaint and his amended complaint are sealed, Long does not dispute that Frey was not named as a defendant before March 1995.

accrual is when plaintiff knows or has reason to know of the injury which is the basis of the action.").

Although it is undisputed that Long was notified of his demotion on November 22, 1991 and placed on administrative leave on January 22, 1992, Long was not terminated until April 8, 1992. Defendant Frey argues that Long had notice and his claim began to accrue at the latest, in January 1992. Long argues, however, that because his termination did not become effective until April 1992, his claim, filed March 15, 1995, is therefore timely.

On the record before this Court, it is not clear whether Long had notice prior to April 8, 1992, that he would be terminated from his position. Because the statute of limitations begins to accrue when the aggrieved party has notice of injury, the precise date on which Long received notice that he would be terminated from employment is crucial to whether this claim is barred. Based on the record before the Court at this time, the Court cannot determine the precise date on which Long had notice. Therefore, because there is a genuine issue of material fact, the Court will **DENY** defendant Frey's motion for summary judgment without prejudice to reconsideration of the motion after discovery is conducted on the issue of when Long received notice that he would be terminated.

Because the Court does not decide whether Long's § 1983 claim against Frey for prospective injunctive relief is barred by the three-year statute of limitations, the Court does not reach defendant Frey's argument for qualified immunity at this time.

III. CONCLUSION

Accordingly, it is hereby

ORDERED that the State of New York's motion to dismiss as to relator Long's unjust enrichment claim is **GRANTED**; and it is further

ORDERED that the State of New York's motion to dismiss as to relator Long's § 3730(h) claim is **GRANTED**; and it is further

ORDERED that the State of New York's motion to dismiss [125-1] as to all other claims is **DENIED**; and it is further

ORDERED that defendant Frey's motion to dismiss as to relator Long's § 3730(h) claim for monetary relief is **GRANTED**; and it is further

ORDERED that defendant Frey's motion to dismiss Long's § 3730(h) claim in Count III is **GRANTED** insofar as Long seeks monetary relief, but **DENIED** insofar as Long seeks prospective injunctive relief; and it is further

ORDERED that defendant Frey's motion to dismiss [127-1] as to all other claims is **DENIED**; and it is further

ORDERED that defendant Frey's motion for summary judgment as to relator Long's § 1983 claim is **DENIED** without prejudice.

Supreme Court, U.S.
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No. 99-213

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SCS BUSINESS & TECHNICAL INSTITUTE, INC. *et al.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RELATOR'S BRIEF IN RESPONSE TO THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Solicitor General accurately sets forth the question presented, as explained by the further statement in his Statement of the case that "[a]lthough the [Court of Appeals] did not squarely decide whether *qui tam* suits against state defendants would violate the Eleventh Amendment, its interpretation of [31 U.S.C.] Section 3729(a) was based in part on the principle that ambiguous statutory provisions should be construed in a manner that avoids substantial constitutional questions." (Pet., p. 4).

Ronald E. Long, the Relator in this False Claims Act case, respectfully responds to the petition for a writ of certiorari filed by the Solicitor General on behalf of the United States of America.

STATEMENT

The Solicitor General accurately sets forth a summary of the significant elements of the False Claims Act, 31 U.S.C.A. *et seq.* ("FCA"), in his paragraph 1.

To the summary of the subject matter of this case stated by the Solicitor General in his paragraph 2, the Relator respectfully adds:

As alleged by the Relator, the State of New York, by its officials, and particularly by its responsible agency director, engaged in a massive, four-year violation of the FCA in federal tuition assistance programs. By actively concealing the fraud of the private defendants, by limiting and subverting the Relator's agency investigation of that fraud, by demoting and firing the Relator, by entering into a concealing sweetheart deal with those defendants, and by directly misrepresenting to the United States that the defendants were not engaged in fraudulent conduct, the state defendants caused the United States Department of Education to pay more than $100 million in tuition payments to the private defendants in order to maintain the flow to the state of fees it imposed on the private defendants' receipt of those funds.

This case was filed in September 1992. Because of the state defendants' motions to dismiss and appeals, only limited discovery concerning documents and preliminary matters has been taken.

The Solicitor General accurately sets forth a summary of the proceedings in the Court of Appeals in his paragraph 3.

ARGUMENT

On June 24, 1999, this Court granted the petition for a writ of certiorari in *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828 ("*Stevens*"). The first question presented in that case and the question primarily presented in the instant case are identical — is a State or state agency a "person" subject to suit under the FCA. As stated in the petition for a writ of certiorari in the instant case, it is the position of the Relator, as well as the United States, that a State or state agency is a "person" subject to potential FCA liability under 31 U.S.C. § 3729(a). Moreover, as the Department of Justice stated in the Court of Appeals in the instant case, and as it states in *Stevens*, an affirmative answer on that issue does not implicate a bar to suits against states and state agencies under the Eleventh Amendment.

The Court's granting of the petition for a writ of certiorari in *Stevens* is a strong indication that the Court considers the primary question presented in the instant case, as well as the Eleventh Amendment issue, worthy of review by this Court and in need of resolution.

We agree with the Solicitor General that, because *Stevens* and the instant case present identical questions and because the Court previously indicated that this question begs resolution by this Court, the instant case is worthy of review.

Respectfully, however, we disagree with the Solicitor General that the petition for a writ of certiorari in the instant

case should be held pending this Court's decision in *Stevens*. If this Court should determine that states and state agencies are "persons" subject to suit under the FCA, and that the Eleventh Amendment does not bar *qui tam* cases of the type presented in *Stevens* and the instant case, there should be no need for further consideration of those issues in the instant case by the courts below.

After seven years of litigation, with little progress toward sharpening the issues in the trial court, the Relator and other litigants in this case should be given the most expeditious resolution of the threshold question of the amenability of the state defendants to suit under the FCA. Consolidation of the two cases will avoid unnecessary costs and delay to the courts, as well as the litigants. Holding the petition, as the Solicitor General suggests, would, we submit, waste the litigants' scarce resources and unnecessarily burden lower courts in assessing the application of a decision in *Stevens* in the instant case.

CONCLUSION

The petition for a writ of certiorari should be granted and the instant case should be consolidated with *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, No. 98-1828.

Respectfully submitted,

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UNITED STATES OF AMERICA,

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v.

SCS BUSINESS & TECHNICAL INSTITUTE, INC., *ET AL.*

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT STATE OF NEW YORK IN RESPONSE TO THE PETITION

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QUESTIONS PRESENTED

1. Whether a State or state agency is a "person" subject to suit under the False Claims Act, 31 U.S.C. § 3729 et seq.?

2. Whether the Eleventh Amendment bars a private citizen from commencing and prosecuting in federal court a False Claims Act lawsuit against a State?

3. Whether the federal courts should first decide the "person" issue under the False Claims Act in order to avoid deciding the serious Eleventh Amendment question?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Authorities iv

Statement of the Case 1

A. Introduction 1

B. Statement of facts 2

C. The lower court proceedings 3

Argument 6

The petition should be granted based on the questions presented in this brief, and this matter should be heard together with *Stevens* 6

I. The first two issues presented herein are identical to the questions presented in *Stevens* and the facts herein exemplify the punitive nature of the statute and the manner in which it interferes with state sovereignty .. 7

A. This appeal illustrates the punitive financial nature of the False Claims Act as applied to States 7

B. This appeal illuminates the manner in which the False Claims Act interferes with state sovereignty 8

II. The Circuits are squarely in conflict over whether the court should decide the "person" issue before it decides the Eleventh Amendment issue and this appeal presents this separate and fundamental question ... 9

Conclusion 11

TABLE OF AUTHORITIES

Page

Cases

Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470 (1973) 6

Edelman v. Jordan, 415 U.S. 651 (1974) 11

Jean v. Nelson, 472 U.S. 846 (1985) 11

United States ex rel. Foulds v. Texas Tech Univ., 171 F.3d 279 (5th Cir.), *pet. for cert. pend'g*, No. 99-365 (Aug. 27, 1999) 6, 9, 10

United States ex rel. Long v. SCS Bus. & Technical Inst., Inc., 173 F.3d 870, (D.C. Cir.), *op. supplemented*, 173 F. 3d 890 (D.C. Cir. 1999) ... 1, 8

United States ex rel. Stevens v. Vermont Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999) ..... *passim*

United States ex rel. Zissler v. Regents of the Univ. of Minnesota, 154 F.3d 870 (8th Cir. 1998) 2, 6

Wisconsin Dep't of Corrections v. Schacht, 524 U.S. 381 (1998) 10

United States Constitution

Eleventh Amendment 5, 6, 9, 10

Federal Statutes

28 U.S.C. § 1291 5

Federal Statutes (Cont'd) **Page**

31 U.S.C. §§ 3729-3733 2
§ 3729(a) 7
§ 3729(a)(1) 4
§ 3729(a)(2) 4
§ 3729(a)(3) 3
§ 3730(b)(4)(A) 4
§ 3730(b)(4)(B) 4
§ 3730(h) 3
§ 3731(b)(1) 5

Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1070-1099 2

New York State Statutes

Education Law Art. 101, §§ 5001-5010 (McKinney 1995 & 1999 Supp) 2
§ 5001(1)(b) 2
§ 5001(9) 7

Laws of 1990, ch. 887 7

New York State Regulations

N.Y. Admin. Code tit. 8, §§ 126.1-.17 (1995) 2

No. 99-213

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1999

UNITED STATES OF AMERICA,

Petitioner,

v.

SCS BUSINESS & TECHNICAL INSTITUTE, INC., *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT STATE OF NEW YORK IN RESPONSE TO THE PETITION

STATEMENT OF THE CASE

A. Introduction

The State of New York agrees with the United States as petitioner that the decision below of the United States Circuit Court of Appeals for District of Columbia Circuit, *United States ex rel. Long v. SCS Bus. & Technical Inst., Inc.*, 173 F.3d 870 (D.C. Cir.), *op. supplemented*, 173 F.3d 890 (D.C. Cir. 1999), holding that New York is not a "person" subject to suit under the

federal False Claims Act, ("FCA"), 31 U.S.C. §§ 3729-3733, is in direct conflict with decisions by the Second Circuit in *United States ex rel. Stevens v. Vermont Agency of Natural Resources* (hereinafter "*Stevens*"), 162 F.3d 195 (2d Cir. 1998), *cert. granted*, 119 S. Ct. 2391 (1999), and the Eighth Circuit in *United States ex rel. Zissler v. Regents of the Univ. of Minnesota*, 154 F.3d 870 (8th Cir. 1998). However, the State does not agree that the petition should be held pending this Court's decision in *Stevens*, No. 98-1828, and, indeed, urges that the case be heard together with *Stevens*.

B. Statement of Facts

New York licenses, regulates and supervises proprietary business schools under provisions set forth in New York law and regulations. *See* N.Y. Educ. Law, Art. 101, §§ 5001-5010 (McKinney 1995 & 1999 Supp.); N.Y. Admin. Code tit. 8, §§ 126.1-.17 (1995). These schools provide a curriculum of business-related courses which may also include English as a second language. N.Y. Educ. Law § 5001(1)(b) (McKinney 1995). The New York State Education Department ("NYSED") through its Bureau of Proprietary School Supervision ("BPSS") administers and enforces this statutory and regulatory scheme.

Students attending eligible proprietary schools are able to apply for grants and guaranteed loans under programs administered or supervised by the United States Department of Education ("USDOE") pursuant to Title IV of the Higher Education Act of 1965, as amended, 20 U.S.C. §§ 1070-1099. These programs provide qualified students with funds to meet their educational costs for attending school. In order to participate in these programs, a school must certify to the USDOE its eligibility to receive federal money and its willingness to abide by federal program requirements. A school that is not in good standing with a State regulatory body faces loss of its federal funding.

Plaintiff Ronald E. Long is the former Coordinator of Investigations and Audit for BPSS. As Coordinator, Long was responsible for supervising BPSS' investigations of proprietary schools. Beginning in September 1989, Long directed an investigation of SCS Business & Technical Institute, Inc. ("SCS"), which operated five schools in New York City. Long alleges that the investigation revealed that SCS was engaged in fraudulent activities and that, as a result of the fraud, the school obtained federal student money for which it was not eligible. Long further claims that his supervisors at NYSED knew about the fraud but decided to conceal it to allow SCS to continue to receive federal funding.

Long was eventually discharged from his position at BPSS in early 1992. Long claims that he was terminated in retaliation for his vigorous pursuit of the SCS investigation. Despite his allegation that State officials assisted SCS, NYSED brought administrative charges in February 1992 against SCS and in March 1992 settled the charges. In the settlement, SCS admitted to wrongdoing in violation of state law, paid a fine of $1 million and agreed to have two BPSS employees monitor its future compliance with the state Education Law.

C. The Lower Court Proceedings

On September 11, 1992, Long, acting as a *qui tam* relator, commenced an FCA lawsuit under seal in the United States District Court for the District of Columbia. Two and one-half years later, on or about March 14, 1995, Long filed an amended complaint alleging that the State, Joseph P. Frey (who was Long's immediate supervisor at BPSS), SCS and SCS officials conspired to defraud the United States in violation of FCA § 3729(a)(3). The amended complaint also alleged that the State defendants retaliated against Long for pursuing false claims against the United States in violation of FCA § 3730(h).

In July 1995, after conducting an investigation, the United States intervened with respect to the SCS defendants and filed a separate First Amended Complaint. *See* 31 U.S.C. § 3730(b)(4)(A). On December 22, 1995, the United States notified the federal district court that, after an investigation of the State defendants, it declined to intervene against the State and Frey. *See* 31 U.S.C. § 3730(b)(4)(B).

Long's amended complaint was unsealed in February 1996. Long's counsel then notified the State that he would be seeking production of voluminous documents, including all documents concerning SCS, Long's employment with NYSED and BPSS' investigation of other proprietary schools. He also noticed the depositions of ten current or former NYSED employees.[1]

Four years after filing his original complaint and in response to a motion by the State defendants to change venue and to dismiss the amended complaint, Long cross-moved to amend his complaint. In the proposed second amended complaint, Long alleged that NYSED officials had continued to defraud the United States from the settlement of the administrative charges through January 1995, when SCS filed for bankruptcy and closed its New York schools. Long also now claimed that the State was liable under FCA §§ 3729(a)(1) and (a)(2) for "causing" SCS to file fraudulent claims. As relief, Long sought treble damages against the State for all of the money received by SCS from September 11, 1986 (which represents the six-year FCA

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[1] The State agreed to informal production of non-privileged documents with respect to SCS and plaintiff's employment, and thousands of documents have been produced. In November, 1996, the district court postponed formal discovery until it resolved the parties' pending motions to dismiss. After rejecting the State's motion in March 1998, the State moved for a protective order while it appealed the court's ruling and, on July 15, 1998, the district court granted the State's motion staying formal discovery pending the outcome of the State's appeal to the United States Court of Appeals for the District of Columbia Circuit.

statute of limitations in 31 U.S.C. 3731(b)(1)), civil penalties of up to $10,000 for each false claim or false record filed by SCS, back pay for his wrongful termination, together with attorney's fees.[2]

In October 1996, the district court denied the defendants' motion to change venue and allowed Long to serve and file his second amended complaint. The State defendants then moved to dismiss Long's second amended complaint and asserted, *inter alia*, that the State could not be sued as a "person" under the FCA and that this complaint was barred by the Eleventh Amendment.

In a decision dated March 26, 1998, the district court (Emmet G. Sullivan, U.S.D.J.) held, *inter alia*, that Long's lawsuit was not barred because the State is a "person" who can be sued under the FCA liability provision, and because the Eleventh Amendment does not bar an FCA lawsuit brought by a *qui tam* relator. App.[3] at 61a-103a, 999 F. Supp. 78 (D.D.C. 1998).

The State filed an interlocutory appeal to the United States Court of Appeals for the District of Columbia Circuit under 28 U.S.C. § 1291 and the collateral order doctrine. In its brief, the State asserted, based upon the long-standing rule of judicial restraint, that the Court of Appeals should decide the "person"

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[2] Long has since stated that New York is only responsible for damages from October 1990 (presumably when the investigation revealed evidence of SCS' alleged fraud) until the schools closed. According to the United States' Second Amended Complaint (March 15, 1996), SCS received more than $100 million in federal education money from fiscal year 1988 through 1992 and filed numerous false statements, records and claims for payment with the federal government. In that complaint, the United States did not quantify the amount of FCA civil penalties or damages after fiscal year 1992 sought against the SCS defendants.

[3] "App." refers to the Appendix included in the petition.

issue before it decided the Eleventh Amendment question in order to avoid decision on a serious constitutional question.

In a unanimous opinion by Judge Silberman, the Court of Appeals reversed the district court and held that New York is not a "person" subject to suit under the FCA. In reaching this decision, it rejected the decisions of the Second and Eighth Circuits in *Stevens* and *Zissler*. The Court of Appeals also decided that, in light of its ruling on the statutory question which was dispositive of the appeal, it should not resolve the serious Eleventh Amendment issue. App. 1a-42a, 173 F.3d 870 (D.C. Cir. 1999). In a supplemental opinion, the court disagreed with the rationale espoused by the Fifth Circuit in *United States ex rel. Foulds v. Texas Tech Univ.*, 171 F.3d 279 (5th Cir.), *pet. for cert. pend'g*, No. 99-365 (Aug. 27, 1999), which had concluded that it was required to decide the Eleventh Amendment question first. *Id.* at 43a-60a, 173 F.3d 890 (D.C. Cir. 1999).

ARGUMENT

THE PETITION SHOULD BE GRANTED BASED ON THE QUESTIONS PRESENTED IN THIS BRIEF, AND THIS MATTER SHOULD BE HEARD TOGETHER WITH *STEVENS*

The questions presented in the *Stevens* appeal pending in this Court, No. 98-1828, and the first two questions presented in the State's response to the United States' petition herein (*see supra* at p. i) are identical. In addition, the third question presented in the State's response is closely related to the first two and involves a fundamental issue over which the Circuits are squarely in conflict.

Because the facts in this matter exemplify the punitive nature of the statute and the manner in which it interferes with state sovereignty, the petition should be granted based on the

questions presented in this brief, *see Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 473 & n.1 (1973), and the appeal should be heard together with *Stevens*. Granting the petition in this case should not cause a delay because the United States (which has not yet filed its respondent's brief in *Stevens*) is the only petitioner. Additional full briefing and participation by New York may assist the Court in resolving the important issues presented in these appeals.

I. The First Two Issues Presented Herein Are Identical to the Questions Presented in *Stevens* and the Facts Herein Exemplify the Punitive Nature of the Statute and the Manner in Which it Interferes with State Sovereignty.

A. This Appeal Illustrates The Punitive Financial Nature of the False Claims Act as Applied To States.

New York is being sued under the FCA for potentially hundreds of millions of dollars in damages, together with unspecified civil penalties (that could amount to millions of additional dollars) for allegedly failing to perform its regulatory and supervisory role properly. Because the FCA provides for treble damages, 31 U.S.C. § 3729(a), and many lower courts have interpreted the FCA to also permit civil penalties to be imposed for each false claim filed, New York's potential financial exposure is very substantial.

Significantly, New York faces large damages and penalties even though New York did not file any false claims with the United States. The only federal money that New York received in this case was obtained indirectly through tuition assessments paid by SCS to BPSS as State licensing fees. *See* 1990 N.Y. Laws ch. 887, § 4 (adding N.Y. Educ. L. § 5001(9) (McKinney 1995)). Under New York law, these assessments can be no greater than seven-tenths of one percent of the schools' gross

annual tuition. N.Y. Educ. L. § 5001(9) (McKinney 1995). Thus, the amount of federal dollars that New York allegedly received from SCS through its purported misconduct is only a small fraction of the millions of dollars in potential damages and civil penalties it is exposed to in this FCA lawsuit.

Moreover, Long, as a former coordinator for investigations for BPSS, is utilizing the *qui tam* provisions of the statute in order to reap a financial windfall even though it was his responsibility to detect wrongdoing by schools. New York's appeal will therefore supplement this Court's analysis in *Stevens* of the punitive nature of the FCA because it will illuminate in striking detail the extent to which the treble damages and civil penalty provisions of the Act can be used to penalize a State's taxpayers. *See also* Brief of *Amici Curiae* States of New York (and 43 Additional States) in Support of Petitioner in *Stevens* (Sept. 3, 1999) at pp. 3-4.

B. This Appeal Illuminates The Manner In Which The False Claims Act Interferes With State Sovereignty.

This appeal also illustrates the manner in which the FCA undermines the harmonious relationship between the federal and state governments. Tellingly, the United States declined to intervene against New York (but not against the SCS co-defendants) and thereby allowed the relator to prosecute the action against the State. Judge Silberman found this practice particularly disturbing because it "suggests that the government does not lightly take on the task of probing into the internal operations of the sovereign states, and may well think it better to leave such politically unpalatable tasks for the qui tam relators of the world." *Long*, 173 F.3d at 885.

Once the United States declined to proceed with the action, Long's counsel sought to proceed with discovery against the State, including the production of voluminous documents and noticing depositions. This appeal therefore illuminates the type of disruption that burdensome discovery and trial in an FCA

lawsuit could have on the State's administration of its own regulatory programs.

Furthermore, an FCA *qui tam* lawsuit can seriously threaten the relationship between the United States' administrative agency and the corollary State agency. In the vast majority of cases, the two agencies work together in order to serve the public interest and make the most efficient use of their combined but limited resources. Because a *qui tam* relator, such as Long, has only a financial interest in the FCA lawsuit and exercises substantial control over the litigation, he is much more likely to raise allegations and pursue the litigation in a manner that "drives a wedge between the two agencies, inhibiting a productive, collaborative partnership, generating suspicion and turning what should be a cooperative relationship into a strained and awkward one." *Stevens*, 162 F.3d at 229 (Weinstein, J., dissenting).

II. The Circuits Are Squarely In Conflict Over Whether The Court Should Decide The "Person" Issue Before It Decides The Eleventh Amendment Issue and This Appeal Presents This Separate And Fundamental Question.

The third question presented in New York's response to this petition is whether the federal courts must decide the statutory "person" question before they decide the serious Eleventh Amendment question. There is a direct conflict on this jurisprudentially important issue among the Courts of Appeals.

In *Foulds*, the Fifth Circuit stated that it must first decide the constitutional issue since the Eleventh Amendment operates as a "jurisdictional limitation." *Foulds*, 171 F.3d at 285. On the other hand, the D.C. Circuit below followed New York's assertion that it should first decide the issue of statutory construction under the well-settled doctrine of judicial restraint. App. at 34a. Judge Silberman then proceeded to write a thorough and well-reasoned opinion on the "person" issue.

In the D.C. Circuit's supplemental opinion, Judge Silberman provided three reasons for disagreeing with the Fifth Circuit's approach in *Foulds*. First, he explained that the court might be obliged to decide the statutory question first because New York had requested that it do so and that request might approach "a partial consent to suit on the statutory question." *Id.* at 47a. Second, Judge Silberman reasoned that the Eleventh Amendment does not operate as a strict limitation upon the court's jurisdiction and, therefore, the court was not required to decide the constitutional issue before it decided the statutory issue. Indeed, the D.C. Circuit noted this Court's most recent pronouncement that whether Eleventh Amendment immunity is a matter of subject matter jurisdiction is an open question. *Id.* at 46a-47a (citing *Wisconsin Dep't of Corrections v. Schacht*, 524 U.S. 381, ___, 118 S. Ct. 2047, 2054 (1998)). Third, Judge Silberman explained that the statutory question is "inextricably related" (App. at 53a) to the Eleventh Amendment issue, and that the determination of whether a cause of action exists "is also a kind of logical prerequisite to the jurisdictional inquiry." *Id.* at 50a.

Vermont properly urges this Court in its brief on the merits in *Stevens* to hold that a State is not a "person".[4] However, the issue whether the federal courts must address the statutory issue before deciding the serious constitutional issue is most directly and expressly raised in this appeal. Granting the petition based on the questions raised in the State's response will, therefore, provide this Court an opportunity to resolve this fundamental question which divided the Fifth and D.C. Circuits and to consider expressly the mode of analysis that should govern its decision in *Stevens*. It will allow this Court to decide whether an Eleventh Amendment defense, which "partakes of the nature of

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[4] The Second Circuit in *Stevens* decided both issues because its ruling was adverse to Vermont on each issue. The court's opinion, however, first resolved the Eleventh Amendment question and then decided the "person" issue. *See Stevens*, 162 F.3d at 203.

a jurisdictional bar," *Edelman v. Jordan*, 415 U.S. 651, 678 (1974), must be resolved first or whether a dispositive and "logically antecedent" question of statutory construction should first be decided under the well-settled ruled of judicial restraint that federal courts must consider nonconstitutional grounds for decision. *Jean v. Nelson*, 472 U.S. 846, 854 (1985). Additional briefing and participation by New York may also assist this Court in resolving the significant issues presented herein. *See* Brief of *Amici Curiae* States of New York (and 43 Additional States) in Support of Petitioner in *Stevens* at pp. 8-27.

CONCLUSION

The petition should be granted based on the questions presented in New York's response, and the matter should be heard together with *Stevens*, No. 98-1828.

Dated: Albany, New York
September 16, 1999

Respectfully submitted,

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